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COMMITTEE FOR PUBLIC COUNSEL SERVICES



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ASSIGNED COUNSEL MANUAL

POLICIES AND PROCEDURES

SEPTEMBER, 1999

This manual informs attorneys representing indigent clients through the Committee for Public Counsel Services pursuant to G.L. c.211D of the qualification, training and performance requirements, the billing process, audit and evaluation procedures, and other policies and procedures related to assignment and compensation.

Attorneys who accept assignments of cases pursuant to G.L. c.211D are required to follow the policies and procedures in this manual and any other CPCS publications, and any amendments, revisions, or additions to CPCS policies and procedures. Indigent Court Cost vendors are subject to the CPCS General Billing Policies and Procedures.

3-11-2008

http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_index.html

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ASSIGNED COUNSEL MANUAL

POLICIES AND PROCEDURES

*1/2018
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**I. SCOPE OF SERVICES OF
COMMITTEE FOR PUBLIC COUNSEL SERVICES
FOR PERSONS DETERMINED TO BE INDIGENT BY THE COURT**

The Committee compensates:

SUPREME JUDICIAL COURT

- Counsel for persons requesting direct appellate review of convictions or adverse decrees.
- Counsel for persons requesting further appellate review of convictions or adverse decrees.
- Single justice petitions.

APPEALS COURT

- Counsel for persons on appeal from convictions or adverse decrees.
- Single justice petitions.

JUVENILE COURT DEPARTMENT

- Counsel for defendants in delinquency matters.
- Counsel for Youthful Offender defendants.
- Counsel for children subject to CHINS proceedings. G.L. c.119 §39F.
- Counsel for parents and children in Care and Protection cases.
- Counsel for parents and children in Substitute Care Reviews
- G.L. c.119 §§24 & 29: Counsel for parents and children in care and protection cases
- G.L. c.119 §§29B & 29C: Counsel for parents and children in substitute care hearings

HOUSING COURT DEPARTMENT

- Counsel for defendants in criminal contempt matters.

PROBATE AND FAMILY COURT DEPARTMENT

	<u>Counsel for Defendants in Criminal Contempt Matters</u>
G.L. c.19A §20(a)	<u>Elderly Abuse</u> Counsel for proposed ward under Elderly Abuse Statute
G.L. c.201 §§6 & 6A; 14	<u>Guardianship</u> - Substituted Judgment for Extraordinary Treatment (for example, anti-psychotic medication, or “Rogers” cases) - With authority to admit/commit to a mental health or mental retardation facility.
	<u>State Intervention Proceeding</u> Counsel for parents and children in: G.L. c.210 §3 Petitions to terminate parental consent to adoption by Commonwealth or licensed social service agency standing in its stead. G.L. c.209C Paternity actions where DSS is a party or the trial court is contemplating giving custody of the child to Department of Social Services or pursuant to <u>Balboni v. Balboni</u> . G.L. c.208 Divorce actions where Department of Social Services is a party or the trial court is contemplating giving custody of minor children to Department of Social Services pursuant to <u>Balboni v. Balboni</u> .
G.L. c.119 §§23C & 29	“Care and Protection” cases

G.L. c.201 §§5 & 14

Guardianships of minors where Commonwealth or agency is petitioning

G.L. c.119 §§29B & 29C

Substitute Care Review Hearings

G.L. c.119 §29

Any other proceeding regarding child custody when the Department of Social Services or a licensed placement agency is a party.

SUPERIOR COURT DEPARTMENT

Counsel for Defendants in Criminal Matters
Where Incarceration Possible

G.L. c.123 §16

Counsel for defendants in petitions to commit as mentally ill

G.L. c.123A §9

Petitions for Release
Counsel for persons declared sexually dangerous petitioning for release

G.L. c.123 §9(b)

Counsel for persons appealing from commitment orders and authorizations to treat

G.L. c.112 §12S

Abortions
Counsel for minors seeking abortions or for their representatives

G.L. c.19C §7

Disabled Persons
Petition for Protective Services

DISTRICT COURT AND BOSTON MUNICIPAL COURT DEPARTMENTS

Counsel for Defendants in Criminal Matters
Where Incarceration Possible

G. L. c.123 §5

Commitments

G. L. c.123 §35

Counsel for respondents in petitions to commit as mentally ill (under §§8, 15, 16, 18); for petitions to commit for alcohol or substance abuse.

G. L. c.123 §12(e)

Warrants of Apprehension

G. L. c.123 §8B

Counsel for petitions for authorization to treat for mental illness.

G. L. c.123 §9(a)

Counsel for Petitioners in Appeals of civil commitments (Appellate Division appeals)

G. L. c.119 §§24 & 29

Counsel for parents and children in care and protection cases

G. L. c.119 §§29B & 29C

Counsel for parents and children in substitute care hearings.

Committee for Public Counsel Services
Assigned Counsel Manual
Policies and Procedures

II. General Policies Applicable to All Assigned Counsel

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CPCS Home Page

1. Attorney Cooperation with Monitoring

Attorneys must cooperate with monitoring, performance evaluations and investigations of any complaints, including billing discrepancies, by the Committee for Public Counsel Services or its designee.

2. Office and Telephone

The attorney must maintain an office easily accessible to the courts in which s/he provides assigned representation, as well as a means for regularly receiving collect telephone calls from clients.

3. Notification of Action or Complaints

The attorney must immediately notify the Deputy Chief Counsel, Private Counsel Division, of any disciplinary action initiated against the attorney by the Board of Bar Overseers and of any criminal complaints, indictments or convictions.

4. Professional Relationship

The attorney must treat the client in a courteous and professional manner. Romantic or sexual contact between attorney and client, or between a supervising attorney and supervisee, is strictly prohibited.

5. Compensation

The attorney shall not accept any compensation or other consideration for assigned representation except through the Committee for Public Counsel Services. This rule applies to both indigent cases and marginally indigent cases.

6. Privately Retained Counsel on Related and Unrelated Cases

For guidelines and policies regarding clients wishing to retain assigned counsel on related and unrelated cases, see Chapter V of this Manual.

7. Certification Requirements

Attorneys accepting cases for which they are not certified will not be paid for those cases.

8. Use of Interpreters

Courts are required to provide all hearing-impaired clients (G.L. c. 221, § 92A) and all non-English speaking clients (G.L. c. 221C) with the services of a court-certified or professional interpreter at all in-court proceedings, regardless of the language skills of counsel. It is the responsibility of assigned counsel to make sure that the court provides such interpreter services for his or her client. It is the responsibility of the court to pay for in-court interpreter services.

For out-of-court pre-trial preparation, including client interviews, the attorney representing the hearing-impaired or non-English-speaking client should obtain the services of a court-certified or professional interpreter, unless counsel is fluent in the client's language. It is the responsibility of assigned counsel to insure the provision of a court-certified or professional interpreter for these purposes, by moving the Court to approve funds pursuant to G.L. c. 261, §§ 27A-27G. CPCS will pay for out-of-court interpreter services upon presentation of the allowed Motion and appropriate billing. See Chapter VI of this Manual.

9. Use of Associates and Paralegals

No prior permission is required to obtain the services of an associate or qualified paralegal. Assigned attorneys may not delegate to associates or paralegals the handling of continuances, hearings, or any part of a trial or oral argument. The delegation of prohibited tasks to associates or paralegals is a violation of the CPCS Performance Guidelines and Standards. Attorneys may not delegate any associate or paralegal tasks to an attorney suspended by CPCS. For further information regarding the use of Associates and Paralegals, and the process for receiving reimbursement for their services, see Chapter V of this Manual.

10. Liability Insurance

Every attorney accepting assignments to represent indigent persons pursuant to G.L. c. 211D must maintain professional liability (malpractice) insurance with a coverage amount of not less than \$100,000/\$300,000, and with a deductible of not more than \$10,000.

Proof of insurance is required annually. Attorneys who do not annually provide proof of insurance are ineligible to receive new assignments.

11. Panel Participation

Service on CPCS panels is at the discretion of the Chief Counsel.

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III. Certification and Assignment Procedures

CHAPTER CONTENTS

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- + District Court Cases
- + Murders & Superior Court Cases
(including Probable Cause Felonies in District Courts)
- + Superior Court Jurisdiction Cases
- + Appeals & Other Post-Conviction Matters

DELINQUENCY & YOUTHFUL OFFENDER PROCEEDINGS

- + Juvenile Delinquency Proceedings
- + Youthful Offender Proceedings

CIVIL PROCEEDINGS

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 - Civil Commitment & "Rogers" Cases
 - Mental Health Appeals
 - Sexually Dangerous Person Commitments & Reviews

+ Children & Family Law Proceedings

- Trial Level
- Children and Family Law Appeals

+ Minors Seeking Judicial Consent for Abortion

+ Sex Offender Registry Board

WAIVERS OF TRAINING REQUIREMENTS

QUALIFICATION STANDARDS

The Committee has adopted qualification standards which attorneys must meet in order to receive assignments. Only those who have demonstrated their qualifications and have been certified by the Committee may be assigned cases and compensated by the Committee. Attorney certification may be subject to ongoing legal education requirements, and/or periodic recertification, depending on the type of assignment.

Those wishing to apply should consult the standards set forth herein and follow the procedures prescribed. Attorneys accepting cases for which they are not certified will not be compensated for those cases.

PERFORMANCE STANDARDS

The Committee has also adopted standards governing performance in various types of cases. See Chapter IV of this Manual. Attorneys accepting assignments must agree to handle their cases consistent with the guidelines. Complaints alleging attorney failure to comply with the Performance Guidelines will be investigated pursuant to Complaint Procedures adopted by the Committee. A copy of these procedures can be found in this manual at Chapter IV.

CRIMINAL PROCEEDINGS

DISTRICT COURT CASES

Attorneys who wish to accept misdemeanors and concurrent felonies in the District Court must (1) be accepted into the panel of attorneys of a county bar advocate program; and (2) complete a required training program. For information on becoming a bar advocate, contact the program in the counties in which you wish to practice. A directory of these programs is included in this manual. No attorney may be a member of more than two bar advocate programs, except attorneys certified as bilingual by the Committee.

Training Requirement

The training requirement is satisfied by attendance at a five-day seminar, Zealous Advocacy. The program is administered through Massachusetts Continuing Legal Education (MCLE) at various locations throughout the state several times a year. Applications are in the MCLE course catalogue. A schedule of training programs and registration information can be obtained by contacting MCLE [(617) 350-7006] or the CPCS Training Unit [(617) 482-6212].

Certification

Attorneys who complete the training requirement are certified to represent indigent adults who are charged with misdemeanors and felonies that are within the final jurisdiction of the District Court as set forth in G.L. c. 218, § 26. Attorneys who complete this training are also certified to represent indigent juveniles in juvenile delinquency cases (see [juvenile delinquency section](#) of this chapter).

Initial certification is provisional, subject to performance evaluation by the county bar advocate program conducted within 12 to 24 months. The evaluation will include file review of cases prepared for trial and cases of clients in custody. Cases will be selected for review by the Supervising Attorney conducting the evaluation. The certification determination will be based upon evidence of compliance with relevant Performance Guidelines set out in this manual at Chapter 4, with particular attention to:

- (1) prompt and consistent client communication
- (2) pretrial preparation including witness interviews and appropriate use of investigators
- (3) legal research and filing of memoranda of law
- (4) conduct of trials and litigation of substantive motions
- (5) cooperation with Resource Attorney
- (6) lack of substantiated client complaints.

Attorneys certified for District Court cases may also represent indigent defendants charged with Superior Court felonies in the district court for arraignment and bail hearings only. If the attorney is not Superior Court certified, s/he must immediately

notify the Bar Advocate Program of the need for prompt reassignment of a bind-over felony case after the arraignment.

Dangerousness hearings under G. L. c. 276, § 58A are considered substantial proceedings in the case, requiring the same certification as the case in chief. Dangerousness hearings in bind-over felony cases must be handled by Superior Court certified attorneys only. If a dangerousness hearing in a bind-over felony case is requested by the prosecutor, assigned counsel lacking certification to handle the case in chief should request a brief continuance and immediately notify the Bar Advocate Program to promptly reassign the case.

In order to handle probable cause hearings in District Court or Superior Court jurisdiction felonies (other than arraignment and bail hearing), attorneys must be certified for Superior Court cases. Additional certification is also required for Youthful Offender, CHINS, and care and protection cases.

Assignment of Cases

District Court cases are assigned through the county bar advocate programs.

Performance Requirements

Attorneys who accept District Court cases, must represent their clients at all stages of the criminal proceedings in the District Court. In the event of a final conviction in the District Court, it is the responsibility of the trial attorney to file a Notice of Appeal, Motion to Withdraw, and a Motion for Appointment of Substitute Counsel for Appeal. Trial counsel should then notify the CPCS Private Counsel Appeals Assignment Unit of the need for appellate counsel to be assigned.

By accepting assignments on District Court cases attorneys agree to abide by the CPCS Performance Standards Governing Representation of Indigents in Criminal Cases, which are found in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

MURDERS AND SUPERIOR COURT CRIMINAL MATTERS, INCLUDING PROBABLE CAUSE FELONIES IN DISTRICT COURTS

The Committee has adopted qualification standards for murder cases and Superior Court criminal matters, including probable cause felonies in district courts. Attorneys who wish to be eligible for assignments in these matters must apply in writing to the Chief Counsel of the Committee demonstrating that they meet the standards set. They will be notified of their status and, if they are approved, they will be placed on the panel. Those standards follow.

FIRST- AND SECOND-DEGREE MURDER CASES

Attorneys who wish to be certified to accept first- and second-degree murder cases must be individually approved by the Chief Counsel of CPCS. Each applicant must meet the minimum requirements set forth below. In addition, the Chief Counsel may consider

any and all additional information that s/he deems relevant to an appropriate decision on each application. In reaching this decision, the Chief Counsel receives a recommendation on each application from a Certification Advisory Board consisting of senior private practitioners from around the state.

Training Requirement: None

Minimum Requirements:

1. Five years' criminal litigation experience
2. Familiarity with practice and procedure of Massachusetts criminal courts
3. Lead counsel during the preceding five years in at least ten jury trials of serious and complex cases, at least five of which have been life felony indictments, in which the cases resulted in a verdict, decision or hung jury
4. Familiarity with and experience in the utilization of expert witnesses, including psychiatric and forensic evidence
5. Attendance at specialized training programs (such as MCLE or bar association criminal practice programs, National Institute for Trial Advocacy, National Criminal Defense College)

Application Procedure:

Attorneys seeking murder assignments should complete and submit an application form obtainable from the Committee's Certification Unit, as well as any additional information relevant to the above-stated requirements.

A list of cases which meet requirement (3) above must be included, giving the name of the case, indictment numbers and charges, names of judges and prosecutors, dates of trial, and a short statement of each case which includes a description of the major issues. Specific cases describing the applicant's utilization of expert witnesses should be included. In addition, the applicant should submit the names, dates, and sponsors of training programs which meet requirement (5) above, as well as the names and addresses of three criminal defense practitioners familiar with the applicant's work. The letter and attachments should be sent to:

CPCS Chief Counsel
44 Bromfield Street
Boston, MA 02108
Attn: Certification Coordinator for Criminal Cases

Applicants will be notified of the decision of the Chief Counsel within 8-12 weeks.

Certification for murder assignments is valid for a term of 4 or 5 years, after which each attorney may seek recertification. Eight (8) hours per year of relevant legal education are required to maintain this certification. Attorneys should maintain records of their continuing legal education in the event they apply for recertification.

Assignment of Cases:

Under the provisions of G.L. c. 211D, § 8, the Chief Counsel will assign murder cases to attorneys certified to handle such cases, subject to the approval of the justice making the determination of indigence.

Performance Requirements:

Attorneys who accept murder cases must represent their clients at all stages of the criminal proceedings except the appeal of a conviction to the Appeals Court or Supreme Judicial Court. In the event of a conviction, however, it remains the responsibility of the trial attorney to file a Notice of Appeal, a Motion to Withdraw, and a Motion to Appoint Substitute Counsel for Appeal, and to notify CPCS of the need for appellate counsel to be assigned.

In addition to representing the client in Superior Court, the attorney who accepts a murder case must provide representation at the probable cause hearing or any other District Court proceeding.

By accepting assignments on murder cases, attorneys agree to abide by the CPCS Performance Guidelines Governing Representation of Indigents in Criminal Cases, which are found in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

SUPERIOR COURT JURISDICTION CASES

In order to be certified to accept Superior Court cases (that is, any charge which is beyond final jurisdiction of the District Court as set out in G.L. c. 218, § 26), attorneys must be individually approved by the Chief Counsel of CPCS.

Attorneys who seek to obtain the approval of the Chief Counsel must meet the minimum requirements set forth below. In addition, the Chief Counsel may consider any and all additional information that s/he deems relevant to an appropriate decision on each application.

Certification for Superior Court assignments is valid for a term of 4 or 5 years, after which each attorney may seek recertification. Eight (8) hours per year of relevant legal education are required to maintain this certification. Attorneys should maintain records of their continuing legal education in the event that they apply for recertification.

Training Requirement:

There is no training prerequisite for initial certification; 8 hours of CLE per fiscal year is required for recertification.

Minimum Requirement:

Applicants who meet the criteria described in any one of the following four categories are eligible to apply to the Chief Counsel for approval for Superior Court cases. To apply, the applicant must:

(A) Be certified by CPCS to accept murder cases;

OR

(B) Meet the minimum requirements for certification for murder cases (outlined in this manual);

OR

(C) Have tried at least six Jury of Six or Superior Court criminal jury trials to verdict in the last five years as lead counsel;

OR

(D) Have other significant experience which demonstrates qualification to accept Superior Court assignments and demonstrates familiarity with the practice and procedures in the Massachusetts criminal courts.

Application Procedure:

Attorneys seeking Superior Court assignments should complete and submit an application form obtainable from the Committee's Certification Unit, as well as any additional information relevant to the above-stated requirements.

Applicants who are applying pursuant to section (B), (C), or (D) above should fully describe the cases which meet the requirements, giving the names of the cases, indictment numbers and charges, names of judges and prosecutors, dates of trials, and a short statement of each case which includes a description of the major issues. Specific cases describing the applicant's utilization of expert witnesses should be included. In addition, the applicant should submit the names, dates, and sponsors of training programs, as well as the names and addresses of three criminal defense practitioners familiar with the applicant's work. The letter and attachments should be sent to:

CPCS Chief Counsel
44 Bromfield Street
Boston, MA 02108
Attn: Certification Coordinator for Criminal Cases

The Chief Counsel will notify the applicant when a decision has been made.

Certification for Superior Court assignments is valid for a term of 4 or 5 years, after which each attorney may seek recertification. Eight (8) hours per year of relevant legal education are required to maintain this certification.

Assignment of Cases:

Superior Court certified attorneys may be assigned Superior Court jurisdiction cases in District Court as bar advocate duty attorneys, or may receive assignments from bar advocate programs immediately after arraignments handled by bar advocate duty attorneys who are not Superior Court certified. Superior Court certified attorneys may also be assigned cases in Superior Court after direct indictment.

Performance Requirements:

Attorneys who accept Superior Court cases must represent their clients at all stages of the criminal proceedings except the appeal of a conviction to the Appeals Court or Supreme Judicial Court. In the event of a conviction, however, it remains the responsibility of the trial attorney to file a Notice of Appeal, a Motion to Withdraw, and a Motion to Appoint Substitute Counsel for Appeal, and to notify CPCS of the need for appellate counsel to be assigned.

In addition to representing the client in Superior Court, the attorney who accepts a Superior Court case must provide representation at the probable cause hearing or any other District Court proceeding and any sentence appeal before the Appellate Division of the Superior Court.

By accepting assignments on Superior Court cases, attorneys agree to abide by the CPCS Performance Guidelines Governing Representation of Indigents in Criminal Cases, which are found in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

APPEALS AND OTHER POST-CONVICTION MATTERS

Attorneys who wish to accept assignments for criminal appeals and other post-conviction matters must be individually approved and must complete a training requirement.

Training Requirement:

Applicants for certification to accept these cases must complete an Appeals and Post-Conviction Training Program offered by CPCS. The training requirement may be completed either before or soon after the applicant is approved for post-conviction certification.

Application Procedure:

The applicant should submit a letter to the CPCS Director of Criminal Appeals explaining in detail why his/her experience qualifies him/her for appeals and post-conviction assignments. A summary of appellate and trial experience should be included, as well as a resume. Two legal writing samples should be submitted with the letter of application, preferably at least one of which addresses a criminal law issue. The applicant should include the names, addresses and phone numbers of two references

who are familiar with the applicant's abilities in legal research and writing, criminal defense and/or appellate practice.

The above package should be sent to:

Donald Bronstein
Director of Criminal Appeals
44 Bromfield Street
Boston, MA 02108

Certification:

Attorneys certified for Appeals and Post-Conviction assignments may receive assignments on criminal appeals, new trial motions, motions for relief from unlawful restraint, motions to revise and revoke, sentence appeals, and other post-conviction matters.

Performance Requirements:

By accepting these assignments, attorneys agree to abide by the Performance Standards Governing the Representation of Clients on Criminal Appeals and Post-Conviction Matters. A copy of these Performance Standards is provided with the acceptance letter and can be found in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

DELINQUENCY & YOUTHFUL OFFENDER PROCEEDINGS

JUVENILE DELINQUENCY PROCEEDINGS

Attorneys who wish to accept juvenile delinquency cases in the District and Juvenile Court must (1) apply for admission into a county bar advocate program; (2) be accepted into the panel of attorneys of a county bar advocate program; and (3) complete a required training program. For information on becoming a bar advocate, contact the program in the counties in which you wish to practice. A directory of these programs is included at the end of this manual. No attorney may be a member of more than two bar advocate programs, except attorneys certified as bilingual by the Committee.

Training Requirement

The training requirement is satisfied by attendance at a five-day seminar, Zealous Advocacy. The program is administered through Massachusetts Continuing Legal Education (MCLE) several times a year. Applications are in the MCLE course catalogue. A schedule of training programs and registration information can be obtained by contacting MCLE [(617) 350-7006] or the CPCS Training Unit [(617) 482-6212].

Certification

Attorneys who complete the training requirement are certified to represent indigent clients in juvenile delinquency proceedings in the Juvenile Courts and the juvenile session of District Courts, except for potential Youthful Offender matters ([see below](#)). Attorneys may also represent indigent juveniles charged with potential Youthful Offender matters in the Juvenile Courts and juvenile sessions of the District Courts for arraignment and bail hearings only. If the attorney is not Youthful Offender certified, s/he must immediately notify the Bar Advocate Program of the need for prompt reassignment of a potential Youthful Offender case after the arraignment.

Dangerousness hearings under G. L. c. 276, § 58A are considered substantial proceedings in the case, requiring the same certification as the case in chief. Dangerousness hearings in potential Youthful Offender cases must be handled by Youthful Offender certified attorneys only. If a dangerousness hearing in a potential Youthful Offender case is requested by the prosecutor, assigned counsel lacking certification to handle the case in chief should request a brief continuance and immediately notify the Bar Advocate Program to promptly reassign the case.

Potential Youthful Offender matters involve defendants under the age of 17 on the date of the alleged offense, who are either:

1) charged with an offense included in the CPCS list of presumptive Youthful Offender matters (see below, under Youthful Offender Certification) regardless of whether the prosecutor obtains an indictment;

or

2) charged with any other offense, and the prosecutor indicts the juvenile.

If the juvenile (under age 17) is charged with an offense on the CPCS Presumptive Youthful Offender list, regardless of whether the prosecutor seeks to indict the juvenile, then a juvenile delinquency certified attorney may represent the client at the arraignment only. The attorney must notify the court and local bar advocate program to assign a Youthful Offender attorney who will represent the client after the arraignment.

If the juvenile (under age 17) is charged with an offense not included in the CPCS Presumptive Youthful Offender list, and the prosecutor obtains an indictment, the juvenile delinquency certified attorney may represent the client only until the indictment is obtained. Once the juvenile is indicted, the attorney must immediately notify the court and local bar advocate program to assign a Youthful Offender attorney who will represent the client after the post-indictment arraignment.

Separate certification is required to handle CHINS, care and protection, and termination of parental rights cases (see CAFL certification sections of this chapter regarding these cases).

Assignment of Cases

Juvenile Court and District Court cases are assigned through the county bar advocate programs.

Performance Requirements

Attorneys who accept assignment on juvenile delinquency cases must represent their clients at all stages of the delinquency proceeding in the Juvenile and District Court.

In the event of a final conviction in the Juvenile Jury Session or the District Court Jury of Six Session, it is the responsibility of the trial attorney to file a Notice of Appeal and Motion to Withdraw and to notify CPCS of the need for appellate counsel to be appointed.

By accepting juvenile delinquency cases, attorneys agree to abide by the CPCS Performance Standards Governing Representation of Indigent Juveniles in Delinquency and Criminal Cases, which are found in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

YOUTHFUL OFFENDER PROCEEDINGS

Attorneys who wish to accept assignments in Youthful Offender cases must (1) meet the minimum requirements, and (2) apply and be accepted to the panel.

Application Procedure:

In order to apply, attorneys must have tried at least five (5) jury trials to completion within the past five years as lead counsel. (Attorneys who have tried at least four jury trials to completion in the past five years may also apply, if they provide additional documentation demonstrating outstanding credentials, experience and recommendations.)

Attorneys with the above minimum qualifications who are interested in being trained and becoming a member of this panel must send a letter in application to Helen Fremont, detailing their most recent (and most serious, or complicated) five jury trials tried to completion in the past five years in which they were lead counsel, including the following information: name of the case; date(s) of the trial; name of the court, judge, and prosecutor; charges; length of trial; issues presented; experts or other forensic specialists used as witnesses; a brief summary of the case; and any other relevant material. Additionally, attorneys must send a recent writing sample of 3-5 pages.

Your letter of application should be sent to:

Helen Fremont, Staff Counsel
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108

Training Requirement:

Upon your acceptance, you will be notified of the next scheduled training program.

Certification:

Attorneys certified for Youthful Offender cases may accept assignments in the following cases:

For the specific charges listed below, if the defendant was under the age of 17 on the date of the alleged offense, only attorneys who are certified for Youthful Offender cases may be assigned to these cases, regardless of whether the prosecutor intends to indict the defendant.

Charges Requiring Youthful Offender Certification	Statute	Offense Codes
Aggravated Rape	c. 265, § 22	631
Armed Assault w/int Rob/Murder	c. 265, § 18	623, 624, 625
Armed Assault in a Dwelling	c. 265, §18A	626
Armed Burglary and Assault on Occupant	c. 266, §14	200
Armed Robbery	c. 265, § 17	621, 622
Assault & Battery on Retarded Person	c. 265, § 13F	
Assault w/int Maim with Inj	c. 265, § 14	611
Assault w/int Maim/Kill/Murder	c. 265, § 15	S08, 613, 614
Assault w/int Rape	c. 265, § 24	636, 637, 638, 639
Attempted Murder	c. 265, § 16	S46
Attempted Arson	c. 266, § 5A	S80
Burglary and Assault in a Dwelling	c. 266, § 14	201
Burning a Dwelling House	c. 266, § 1	500
Burning a Public Building	c. 266, § 2	501, 502
Carjacking	c. 265, § 21A	
Carrying Firearm w/o Lic.	c. 269, § 10 (A, D)	702, 703
Gun Cases	c. 269, ¶ (a), (c), (d), or (j) of § 10 or § 10E	702, 703, 704, 705, 706, 707
Home Invasion	c. 265, § 18C	666
Indecent Assault and Battery	c. 265, §§13B, F, H	S41, 606, 607, 610
Kidnapping	c. 265, § 26	640
Manslaughter	c. 265, § 13	603
Mayhem	c. 265, § 14	612
MV Homicide	c. 90, § 24G	050, 052, 053, 054, 055, 056, 057
Poss Shotgun Barrel Under 18"/Machine Gun	c. 269, § 10C	704, 705, 706
Rape	c. 265, §§ 22, 22A, 25	632, 633, 634, 635
Statutory Rape	c. 265, § 23	S01

Only the above enumerated charges will require assignment of a Youthful Offender attorney, REGARDLESS of the prosecutor's intent to indict.

Attorneys who are not Youthful Offender certified, but who are juvenile delinquency certified, may accept assignment of the above listed cases FOR ARRAIGNMENT ONLY. Delinquency certified attorneys must immediately notify the court and the bar advocate program that they can only represent the client at arraignment; assignment of a Youthful Offender certified attorney must be made immediately after the arraignment.

ALL OTHER DELINQUENCY CASES: Attorneys who are certified to handle juvenile delinquency cases can handle all other delinquency cases NOT LISTED ABOVE **until** the prosecution indicts the defendant as a Youthful Offender. **At that time**, if the attorney is not Youthful Offender certified, s/he must withdraw from the case, notify the client, court, and bar advocate program, and a Youthful Offender attorney must be reassigned to the case.

Assignment of Cases:

Youthful Offender certified attorneys may be assigned Youthful Offender cases in Juvenile Court and in the juvenile session of the District Court as bar advocate duty attorneys, or may receive assignments from bar advocate programs immediately after arraignments handled by bar advocate duty attorneys who are not Youthful Offender certified.

Performance Requirements:

Attorneys who accept assignment on Youthful Offender cases must represent their clients at all stages of the proceeding in the Juvenile/District Court.

In the event of a final conviction, it is the responsibility of the trial attorney to file a Notice of Appeal and Motion to Withdraw and to notify CPCS of the need for appellate counsel to be appointed.

By accepting Youthful Offender cases, attorneys agree to abide by the CPCS Performance Standards Governing Representation of Indigent Juveniles in Delinquency and Criminal Cases, and the CPCS Performance Standards Governing Representation of Indigents in Criminal Cases, which are found in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

CIVIL PROCEEDINGS

MENTAL HEALTH PROCEEDINGS

The Committee has adopted performance standards for civil commitment proceedings, for guardianship proceedings in which the authority to administer extraordinary medical treatment is sought (so-called "substituted judgment" or "Rogers" cases), for appeals in such cases, and for proceedings involving the commitment or review of "sexually dangerous persons." Attorneys who wish to be eligible to accept assignments in such cases must agree to abide by these standards and must complete certain training requirements established by the Committee for Public Counsel Services. Training schedules for each certification category will be published in the Committee's Certification Bulletin, and on the Mental Health Litigation Unit's web site (www.mass.gov/cpcs/mhp).

Civil Commitment and "Rogers" Cases

Certification:

Attorneys who wish to be certified to accept assignments in civil commitment proceedings and guardianship proceedings in which the authority to administer extraordinary medical treatment is sought must apply for admission into the program and, if accepted, then must complete a two-part training program, described below. To maintain certification, attorneys must complete at least 8 hours of approved continuing legal education annually. A listing of approved programs will be published periodically on the Mental Health Litigation Unit's web site (www.mass.gov/cpcs/mhp).

Training Requirement:

Applicants for certification first must complete a four-day training program, "CPCS Mental Health Proceedings and Advocacy for Assigned Counsel," offered by CPCS through MCLE. Thereafter, applicants must complete an eight-hour training program on the clinical aspects of mental illness and treatment, conducted by the University of Massachusetts Medical Center, Department of Psychiatry, under the auspices of CPCS. Please see MCLE catalogues or the Mental Health Litigation Unit's web site (www.mass.gov/cpcs/mhp) for dates and locations of the training programs.

Assignment of Cases:

The Mental Health Litigation Unit directly assigns counsel in most civil commitment proceedings in the District Court Department and the Superior Court Department. CPCS provides Probate Courts with lists of certified attorneys from which the Courts make appropriate assignments in "substituted judgment" proceedings.

Performance Requirements:

By accepting mental health case assignments, attorneys agree to abide by the CPCS Civil Commitment Performance Standards and the CPCS Performance Standards for Guardianship with Authority to Administer Extraordinary Medical Treatment. These

Performance Standards are found in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

Mental Health Appeals

Certification:

Applicants for mental health appellate certification must first be certified to accept assignments in civil commitment and "Rogers" cases, and must then complete a one-day training program, "Appellate Advocacy and Procedure in Mental Health Cases," offered through MCLE. Please see MCLE catalogues or the Mental Health Litigation Unit's web site (www.mass.gov/cpcs/mhp) for dates and locations of the training program.

Assignment of Cases:

Assignments are made by CPCS upon notification by trial counsel of the filing of an appeal.

Performance Requirements:

By accepting mental health case assignments, attorneys agree to abide by the applicable CPCS Performance Standards, copies of which are found in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

Sexually Dangerous Person Commitments and Reviews

Certification:

Certification for assignments in proceedings in which day-to-life commitments to the Treatment Center for Sexually Dangerous Persons in Bridgewater are sought, and for the annual reviews of such commitments, requires completion of a training program, "Defending the Accused: Sexually Dangerous Person Civil Commitments," (sponsored by CPCS and MCLE) and either (i) [CPCS certification to accept Superior Court assignments](#), or (ii) [CPCS certification to accept Youthful Offender assignments](#), or (iii) acceptance by the MHLU Director. Please see MCLE catalogues or the Mental Health Litigation Unit's web site (www.mass.gov/cpcs/mhp) for dates and locations of the training program.

Assignment of Cases:

Assignments are made by the Mental Health Litigation Unit.

Performance Requirements:

By accepting assignments in these cases, attorneys agree to abide by the CPCS Sexually Dangerous Person Commitment Performance Standards. These Performance Standards are found in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

CHILDREN AND FAMILY LAW PROCEEDINGS

Trial Level

(Care and Protection, CHINS and Termination of Parental Rights Petitions)

Attorneys who wish to accept assignments from the trial court in care and protection, CHINS and termination of parental rights cases must (1) apply for admission to the CAFL program; (2) successfully complete all required trainings; (3) work with a mentor assigned through the CAFL program; and (4) attend eight hours of approved continuing legal education each fiscal year.

Application Procedure

Attorneys who wish to apply for certification to accept trial level assignments must complete an application for the Children and Family Law (CAFL) trial panel certification program. Applications are available on the CPCS and MCLE web sites, or may be obtained from the CAFL Certification Coordinator. Attorneys will be notified if they are accepted into the training program.

Training Requirements

Attorneys accepted into the program must attend a five-day seminar, "Children and Family Law Trial Panel Certification Training Program". Applicants with significant trial experience may apply for a waiver of the last two days of training. The program is administered through Massachusetts Continuing Legal Education (MCLE), and is held several times a year. Newly certified CAFL trial attorneys also must attend a 4-hour seminar, Medical Treatment Decisions for Children in DSS Custody, administered by CPCS and offered once a year.

Once trial panel certified, attorneys must maintain certification through the annual completion of 8 hours of approved continuing legal education on a fiscal year basis. The fiscal year begins on July 1 and concludes on June 30. Newly certified trial panel attorneys are required to satisfy the continuing education requirement in the fiscal year subsequent to the fiscal year certification was received.

Continuing legal education credits may be obtained by attendance at CAFL- sponsored trainings through MCLE or in various regions throughout the Commonwealth, the CPCS Annual Training, or other approved seminars. A list of approved seminars is available on the CPCS web site, www.mass.gov/cpcs. To obtain approval for attending a program that is not on the list, submit a request for approval together with a comprehensive description of the program, including its length and a syllabus describing its contents and faculty, to the Training Director, CAFL Program of CPCS. Attorneys are urged to seek approval prior to attending such programs.

To obtain credit for attending a program, the attorney must submit CLE certificates or proofs of attendance, on or before June 30th of each fiscal year, to the CAFL Certification Coordinator, CPCS, 44 Bromfield Street, Boston, MA 02108; fax: (617) 988-8455.

Assignment of Cases

CPCS provides the Juvenile, District, and Probate Courts with a list of CAFL-certified trial attorneys who wish to accept assignments in particular courts. Courts make assignments from these lists.

Provisional Certification

Attorneys who have satisfied the course training requirements are provisionally certified for the first eighteen months after the assignment of the first case. The attorney must work cooperatively with his or her assigned mentor as required by the CAFL Mentor Program Requirements. The mentor will report to the CAFL program regarding the work of the attorney after the eighteen-month period. The CAFL program will then determine whether the attorney will (a) be certified and permitted to take additional assignments without supervision of a mentor; (b) be permitted to take additional assignments with continued mentor supervision, (c) be permitted to continue to take cases with a limitation on the number of cases allowed and/or type of cases assigned or (d) be removed from the panel and have his/her cases reassigned.

At any time during the provisional certification period the CAFL program may take any of the above actions for good cause shown.

Performance Requirements

By accepting assignments in CAFL cases attorneys agree to abide by all applicable CPCS Performance Standards Governing Representation of Children and Parents in Child Welfare Cases. Copies of the Standards are contained in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

Children and Family Law Appeals

Attorneys who wish to apply for certification to accept appellate level assignments must complete an application for the Children and Family Law (CAFL) appellate panel. Applications are available on the CPCS and MCLE web sites, or may be obtained from the CAFL Certification Coordinator. Applicants must send in a completed application, a resume, two legal writing samples, and two references from individuals who have knowledge of the applicant's qualifications, character, integrity, thoroughness and research and writing abilities. Attorneys will be notified if they are accepted into the training program.

Initial Training Requirements:

Attorneys accepted into the program who are already certified by CPCS to take trial level CAFL appointments must attend the one-day course, "Appealing CPCS Children and Family Law Cases." Attorneys who are not currently certified by CPCS to take trial level CAFL appointments must attend the one-day course, "Appealing CPCS Children and Family Law Cases" and the three-day portion of the trial panel certification course concerning substantive law. The two-day trial skills portion of the trial panel certification course is not required.

Annual Training Requirements:

Attorneys certified to take CAFL appeals must maintain certification through the annual completion of 8 hours of approved continuing legal education on a fiscal year basis. The fiscal year begins on July 1 and concludes on June 30. Newly certified appellate panel attorneys are required to satisfy the continuing education requirement in the fiscal year subsequent to the fiscal year certification was received.

Continuing legal education credits may be obtained by attendance at CAFL sponsored trainings through MCLE or in various regions throughout the Commonwealth, the CPCS Annual Training, or other approved seminars. A list of approved seminars is available on the CPCS web site, www.mass.gov/cpcs. To obtain approval for attending a program that is not on the list, submit a request for approval together with a comprehensive description of the program, including its length and a syllabus describing its contents and faculty, to the CAFL program of CPCS. Attorneys are urged to seek approval prior to attending such programs.

Attorneys who are certified for both the CAFL trial and appellate panels need only take a total of 8 hours of approved CLEs on a fiscal year basis.

Minimum Qualifications:

1. Two years of legal experience in the field of state intervention law or substantial appellate experience; and
2. Demonstrated proficiency in legal research and writing.

Application Procedure:

Training is held annually and applications are available on the CPCS and MCLE websites and from the CAFL certification coordinator. Applicants must send in a completed application, a resume, two legal writing samples, and two references from individuals who have knowledge of the applicant's qualifications, character, integrity, thoroughness and research and writing abilities.

CPCS will notify applicants of whether they have been accepted for training. Upon acceptance, attorneys will be given a schedule of training programs.

Provisional Certification:

Attorneys who are accepted for certification are provisionally certified through the filing of at least their first two appellate briefs and oral arguments, if any. For each appellate assignment, the provisionally-certified attorney must work with a mentor who will review transcripts to identify appellate issues and research strategy, edit drafts of briefs prior to submission, authorize the filing of the brief, help the provisionally-certified attorney prepare for oral argument and for other issues related to the appeal. Cooperation with the appellate mentor is required.

After the attorney completes two briefs, the mentor will report to CPCS regarding the provisionally-certified attorney's work. The CAFL Co-Director(s) or her/his designee will determine whether the provisionally-certified attorney (a) may be certified and permitted to take additional appellate assignments without supervision of a mentor, (b) may be permitted to take one or two additional appellate assignments with continued mentor

supervision, or (c) may not be certified and may not take additional appellate assignments.

Performance Requirements:

By accepting assignments for CAFL appeals attorneys must abide by the CPCS Performance Standards for the Representation of Clients in Child Welfare Appeals. Copies of the Standards are contained in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

Attorneys must submit copies of all briefs filed to the Children and Family Law program, or, if the case is closed before briefing, must notify the Children and Family Law program of the reason the appellate assignment is closed.

MINORS SEEKING JUDICIAL CONSENT FOR ABORTION

The Committee has adopted performance standards governing representation of minors seeking abortion. Attorneys who wish to be eligible to accept assignments in these cases must agree to abide by these standards and complete a training session.

Training Requirement:

The training requirement is satisfied by attending a two-hour training program, Judicial Consent for Minors, which is co-sponsored by CPCS, the National Lawyers Guild, and the Women's Bar of Massachusetts. The program is offered periodically at various locations throughout the state. A contribution of \$25 for materials is requested.

For information about training programs and registration information, contact:

Jamie A. Sabino, Esq., 52 Western Avenue, Cambridge, MA 02139

Tel: (617) 492-5085; Fax: (617) 492-5098; Email: klibaner@sprintmail.com

Or contact:

Sarah McLean, Esq., 101 Tremont Street, Suite 1107, Boston, MA 02108

Tel: (617) 482-8296; Fax: (617) 338-8299; Email: Smccln@aol.com

Assignment of Cases:

CPCS provides a list of certified attorneys to clinics and some courts. The majority of the assignments are made by clinics except for Hampden County, where the assignments may be made by the court.

Performance Requirements:

By accepting assignments on these cases attorneys agree to abide by the CPCS Performance Standards for Attorneys Representing Minors in Section 12S Hearings, which are found in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

SEX OFFENDER REGISTRY BOARD CASES

In order to receive case assignments in Sex Offender Registry Board proceedings at the Trial Court level, attorneys must (1) be eligible for certification for Superior Court or District Court criminal cases or (2) possess other substantial, relevant experience, and (3) complete a training program. In order to receive such assignments at the Appellate Court level, attorneys must be certified for SORB trial level cases, possess appellate experience, and be individually approved by the Deputy Chief Counsel or his/her designee.

Training Requirement:

Applicants for certification must complete the Representation in Sex Offender Registry Proceedings course offered by CPCS. Additional training presentations may be required due to changes in the law. Mentors with civil litigation experience will be made available by CPCS for consultation. Applications to fulfill this training requirement can be obtained from the CPCS Training Unit in Boston (617) 482-6212.

Application Procedure:

The completed application for training should be returned to the CPCS Training Unit, 44 Bromfield Street, Boston, MA phone: (617) 482-6212; fax: (617) 988-8350. Applications by attorneys who are not certified for Superior or District Court criminal assignments, and applications for SORB Appeals cases should be made by letter detailing relevant experience to the CPCS SORB Assignment Coordinator.

Assignment of Cases:

Cases will be assigned by the CPCS Boston office. Notices of Assignment will be sent by FAX, with next day confirmation of acceptance by counsel required. Attorneys without FAX numbers, but who wish to receive these assignments, should telephone the CPCS SORB Assignment Coordinator at (617) 482-6212 to make arrangements for notification.

Attorneys are requested to inform CPCS of the number of case assignments desired per quarter. Please inform the SORB Assignment Coordinator at (617) 482-6212.

Performance Requirements:

By accepting assignments of these cases attorneys agree to abide by the CPCS Performance Standards for Attorneys Representing Clients in Sex Offender Registry Board matters, which are found in this manual at Chapter 4, and are available online at www.mass.gov/cpcs.

WAIVERS OF TRAINING REQUIREMENTS

CPCS has instituted training requirements for certification in most categories of cases in order to assure that each attorney accepting assignments has sufficient training to provide high quality representation. The training requirement is rarely waived.

A request for a waiver will be considered only if the applicant has exceptional experience in the field in which s/he seeks certification. The applicant requesting a waiver must submit a letter to the Director of the appropriate certification panel explaining in detail why the training requirement should be waived. The letter should describe the applicant's litigation experience, familiarity with practice and procedure of Massachusetts courts, and familiarity with the area of substantive law in which the waiver is sought. Specific information should be provided about cases in which the applicant has provided representation as lead counsel, including court, docket number, names of judges and opposing counsel, dates of court appearances, and a description of the issues in each case. Specific cases describing the applicant's utilization of expert witnesses should also be included. Information about specialized training courses the applicant has attended or taught should be provided, including the names, dates and sponsors of the training programs.

Waiver of a training requirement is within the discretion of the Chief Counsel, who may consider any additional information s/he considers relevant.

CPCS PERFORMANCE GUIDELINES

GOVERNING CRIMINAL CASES IN DRUG COURTS

A. Prior to appearing in a drug court session for the first time or to advising a client of the advantages and disadvantages of entering a drug court program, counsel should thoroughly investigate the policies and practices of the session, including the following:

1. conformity of the program with the Trial Court Policy for Drug Court Sessions, including the provision that “[n]o defendant shall be required to surrender any of his or her due process rights as a condition of assignment to or participation in any drug court session” §IX, paragraph 7;
2. eligibility requirements and restrictions;
3. the role and responsibilities of each party within the session, including the judge, prosecutor, probation officer, treatment provider and defense attorney;
4. the procedures for addressing violations of program requirements, imposition of graduated sanctions, and modifications which may result in confinement;
5. the procedures for addressing violations of probation which may result in termination of the client from the program;
6. the ability of a client to voluntarily withdraw from the program.

B. Drug courts operate within a framework that encourages a non-adversarial, “team” approach by all parties. The sole responsibility of counsel, however, is to advocate for and protect the interests of a client; it is not to be part of a team. Counsel should always advocate zealously for a client consistent with the role of defense counsel as described in the CPCS Performance Guidelines Governing Criminal Cases, §1.1.

C. Discussions of a client’s participation in a drug court session which include the judge, probation officers, treatment providers and prosecutors, sometimes referred to as “team meetings,” must comport with due process rights of the client. Trial Court Policy for Drug Court Sessions, §IX, paragraph 8. If a judge is present, due process requires that such discussions occur on the record and in the client’s presence. Upon a client’s first appearance in a drug court session, counsel should file a written motion requesting that any discussions with a judge concerning the client occur on the record and in the client’s presence. If the motion is denied, counsel should object on the record.

D. Counsel should only participate in a “team meeting” or discussion involving a client whom counsel represents, after counsel has sufficient opportunity to meet with the client, investigate the case, and prepare to represent the interests of the client. Counsel should not participate in a “team meeting” or other discussions concerning drug court participants who are not clients.

E. Whenever a probation officer, treatment provider or prosecutor advocates to a judge that a client at liberty should be subjected to any form of confinement (including inpatient substance abuse treatment), the client is entitled to be represented by counsel. ABA Standards Relating to Probation §3.3 (Approved Draft, 1970); Commonwealth v. Faulkner, 418 Mass. 352 (1994). In addition to the right to counsel, a request for modification of conditions of probation that results in confinement (as distinct from a request for probation detention pursuant to a notice of surrender) triggers other due process rights, including the right of the client to notice of the reasons confinement is being requested, the right of the client to be present, and the opportunity to be heard and to challenge the requested modification.

F. Counsel should be familiar with the Trial Court Policy for Drug Court Sessions and should be prepared to cite from it when advocating for a client.

G. When representing a client in a drug court session, counsel should have a thorough understanding of the law governing probation detention and probation surrenders and of its applicability to drug court sessions. Counsel should ensure that the court provides the client “the same due process rights as other persons placed upon probation supervision.” Trial Court Policy for Drug Court Sessions, §IX, paragraph 7.

H. When discussing with a client the advisability of entering a drug court program, counsel should fully explain to the client the policies and practices of the program. Prior to providing such advice, counsel should interview the client, fully investigate the case, research the viability of any motions to dismiss and/or motions to suppress, and prepare a defense in the event the case proceeds to trial. Counsel should not advise a client at arraignment about whether to enter a drug court program. The decision whether to enter a drug court program belongs to the client after full consultation with counsel. See CPCS Performance Guidelines Governing Criminal Cases, §§5.1 - 5.2.

I. After adequate consultation with counsel, if a client wishes to enter a drug court program, counsel should vigorously advocate for acceptance of the client into the program despite policies which may make the client ineligible (e.g., if the client is charged with a sex offense and the policy of the program excludes individuals charged with such offenses).

J. Counsel should vigorously advocate for the admission of a client who wishes to enter a drug court program after arguing a motion to suppress, a motion to dismiss, or after a jury trial, despite the policy of the program that requires the waiver of due process rights prior to admission. In advocating for the client’s admission, counsel should cite the Trial Court Policy for Drug Court Sessions that prohibits exclusion on those grounds. §IX, paragraph 7.

K. Counsel should be familiar with federal and state law governing confidentiality of substance abuse treatment records and its applicability to treatment received by clients participating in drug court sessions. See 42 U.S.C. 290dd-2 (can be found at <http://www.findlaw.com>); 42 C.F.R. §§2.1-2.67 (found at <http://www.access.gpo.gov/nara/cfr/index.html>); M.G.L. ch.111E, §18.

1. Counsel should fully explain to a client the laws governing confidentiality of substance abuse treatment records and of statements of the client made in the course of such treatment. Counsel should further advise a client that, despite laws restricting the use of treatment records to prosecute or criminally investigate a client, especially in the case of serious crimes, the possibility exists that treatment records could be used in a subsequent prosecution of the client.

2. Upon entering a drug court program, a client will be requested to sign a consent form which permits substance abuse treatment providers to disclose information about the client to drug court personnel, i.e. the judge, probation officer, prosecutor and defense attorney. Counsel should fully explain the waiver before the client signs it. Counsel should add language to the waiver that consent of the client is limited to use of the information in the drug court session, and the client does not consent to disclosure for use in any other context, including for any subsequent prosecution or criminal investigation.

IV. Performance Standards and Complaint Procedures

A. CRIMINAL DISTRICT COURT JURISDICTION, SUPERIOR COURT JURISDICTION, AND MURDER CASES

1. COMMITTEE FOR PUBLIC COUNSEL SERVICES PERFORMANCE GUIDELINES GOVERNING REPRESENTATION OF INDIGENTS IN CRIMINAL CASES

These guidelines are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.21 ID. Counsel assigned pursuant to G.L. c.21 ID must comply with these guidelines and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these guidelines and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

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1. GENERAL PRINCIPLES OF REPRESENTATION

1.1 Role of Defense Counsel

Counsel's role in the criminal justice system is to ensure that the interests and rights of the client are fully protected and advanced. Counsel's personal opinion of the client's guilt is totally irrelevant. The client's financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney. Counsel must know and adhere to all applicable ethical opinions and standards and comply with the rules of the court. Where appropriate, counsel may consider a legal challenge to inappropriate rules and/or opinions. If in doubt about ethical issues in a case, counsel should seek guidance from other experienced counsel or from the Board of Bar Overseers. Counsel shall interpret any good-faith ambiguities in the light most favorable to the client.

1.2 Education, Training and Experience of Defense Counsel

To provide competent representation, counsel must be familiar with Massachusetts criminal law and procedure, including changes and developments in the law. It is counsel's obligation to remain current with changes in the statutory and decisional law. Counsel should participate in skills training and education programs in order to maintain and enhance skills. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept the more serious and complex criminal cases only after having had experience and/or training in less complex criminal matters. Where appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, probation officers, and other court personnel.

1.3 General Duties of Defense Counsel

- a. Counsel's primary and most fundamental responsibility is to promote and protect the client's interest. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case. If personal reactions make it impossible for counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client.
- b. Counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. When counsel is assigned to represent a new client and the client is held in custody (e.g. in jail, house of correction, prison or other place of commitment for alcohol/drug or mental health evaluation), counsel should visit the client within three business days of receiving the assignment. In those instances when it will not be possible for counsel to see a new in-custody client within three business days of assignment, the attorney must: (1) write to the client within three business days of receiving the assignment and advise the client that s/he has been assigned to the representation and also inform the client of the date upon which counsel will visit the client; and (2) if appropriate, provide the client with a copy of discovery received in the case. Under no circumstances should an initial visit to a new in-custody client be delayed more than one week from the date of assignment. Counsel should assure him/herself that the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. The client must be given adequate time to fully apprise counsel of the evidence and defenses in his/her case.
- c. Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving regular collect telephone calls from incarcerated clients. Counsel must provide incarcerated clients with directions on how to contact the office via collect telephone calls (e.g. what days and/or hours calls will be accepted).
- d. Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client. As part of this file, counsel should maintain a "running sheet" or log which records information such as information obtained during all interviews of the client; interviews of witnesses, interviews of family members, friends and employers; client's background and history; court dates and events; contact with

investigators and results of investigations; conversations with the prosecutor regarding discovery, dispositional issues including plea offers, trial issues; conversations with the probation officer; lobby conferences or conversations with a judge; conversations with police officers or commonwealth investigators; telephone conversations regarding the case; conversations, consultation and evaluation by experts, etc.

- e. Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client. Such conflicts should be avoided where possible or addressed in a timely manner.
- f. The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to plead guilty or not guilty and to change such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal, and whether to waive his/her right to a speedy trial.
- g. The attorney should explain that final decisions concerning trial strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney's decision-making role in this regard is consideration of the client's input and full disclosure by the attorney to the client of the factors considered by the attorney in making the decisions. Counsel should inform the client of an attorney's ethical obligation, informed by professional judgment, not to present frivolous matters or unfounded actions.
- h. Counsel's obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel and must, upon request, promptly provide successor counsel with the client's entire case file, including work product.
- i. Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.
- j. Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared. Counsel should follow appropriate court practices to minimize inconvenience to any individuals.
- k. Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g., motions to change venue, etc.
- l. Where counsel is unable to communicate with the client because of language differences, the attorney shall take whatever steps are necessary to fully explain the proceedings. Such steps would include obtaining funds for an interpreter to assist with pre-trial preparation, interviews, and investigation as well as in-court proceedings.
- m. Where counsel is unable to communicate with the client because of mental disability, the attorney shall obtain expert assistance for an evaluation of the client to determine what steps, if any, can be taken to improve communication and understanding to acceptable levels. If no steps can be taken, counsel should address the court on the issue of the client's competence.
- n. Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client and the court, and to minimize the inconvenience to others.

II. PRELIMINARY PROCEEDINGS & PREPARATION

2.1 Arraignment

- a. Counsel should be familiar with the bail laws, including the legal standards the court may consider in setting the conditions of release (G.L. c.276, §58) as well as the procedure for appeal of the court's decision. If the nature of the offense and/or the client's record indicate that the client may not be released on personal recognizance, counsel should insist on an opportunity to interview the client and conduct an appropriate investigation before the court considers setting bail. Before interviewing the client, counsel should examine the complaint and/or indictment and inform the client of the exact charges, should review the police report(s) and should review the client's probation record paying particular attention to any

- convictions, incarcerations, defaults, pending cases, open probation matters and open restraining orders.
- b. Counsel should be familiar with the law regarding pre-trial detention on the grounds of “dangerousness” (G.L. c. 276, §58A). If the Commonwealth moves for a hearing to determine whether or not the client should be detained, counsel should determine whether or not there is a legal basis for such a motion. Counsel should seek to minimize the amount of time the client is held prior to a detention hearing. In preparing for a detention hearing, counsel should consider the wisdom and consequences of summoning witnesses including the complainant.¹
 - c. In addition, counsel should be familiar with the law regarding bail revocation, pursuant to G.L. c. 276, §58 and be prepared to raise constitutional issues. If the Commonwealth moves to revoke the client’s bail on another case due to the new offense, counsel should determine whether or not there is a legal basis for such a motion. Counsel should be prepared to argue that the client facing bail revocation is entitled to the same process and the Commonwealth has the same burden of proof by clear and convincing evidence as a client facing §58A preventive detention. Counsel should insist upon a hearing, notice and time to prepare and subpoena witnesses.
 - d. Counsel should strongly advise the client not to waive any significant rights at this proceeding, including whether to proceed with a jury trial or to have the case heard in the bench trial division.
 - 1. A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare circumstances, and if the attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later, especially one which does not involve a criminal record such as diversion, drug evaluation under G.L. c.111 (e), mediation, or a continuance without a finding. However, counsel should be aware of potential immigration consequences of a continuance without a finding, which may be considered a conviction for immigration purposes.
 - 2. Where strategically appropriate and especially if the client may be held on bail, counsel should request a trial or probable cause hearing as soon as practicable within thirty days (G.L. c.276, §35).
 - e. Counsel should be thoroughly familiar with the law and court practices regarding competence to stand trial and criminal responsibility (G.L. c.123, §§15a and 15b; Mass. R. Crim. P. 14). Counsel should also be aware of, and protect, the client’s statutory and constitutional rights with respect to such competency examinations. Counsel who is appointed to represent the client for bail only should give special consideration to these issues and should rarely, if ever, agree to such a commitment at the time of the client’s arraignment.
 - f. The assigned criminal defense trial counsel should represent the client at any competency hearing arising in the case.

2.2 Initial Interview and Preparation for Bail Hearing

- a. The scope and focus of the initial interview will vary according to the circumstances under which it occurs. A meeting or conversation conducted in a courthouse hallway or lockup is not a substitute for a thorough interview conducted in private.
- b. Counsel should observe and consider arranging for the documentation of any marks or wounds pertinent to the case, and secure and document any transient physical evidence.
- c. Counsel should prevent the destruction of exculpatory evidence by the prompt filing of a Motion to Preserve Evidence, including preparation for the Court of an order with instructions that the prosecutor immediately inform its agents of the order.
- d. If identification may be an issue, counsel should be aware of, and consider preventing, any identification opportunities for prosecution witnesses that may arise at arraignment.
- e. If the client may be detained, the focus of the initial interview and investigation will be to obtain information relevant to the determination of bail and/or pretrial conditions of release. Such information

¹ Counsel is not eligible to handle the case-in-chief, s/he should seek assignment to eligible counsel prior to the detention hearing.

should generally include:

1. client's residence and length of time at that residence;
2. family (names, addresses and phone numbers);
3. client's health (mental and physical);
4. educational and/or employment background;
5. explanation of any court defaults and any other information on the record;
6. probation/parole status;
7. possible sources of bail money;
8. the general circumstances of the alleged offense and/or arrest, including, where relevant, any identification procedures that occurred;
9. client's reputation in the community;
10. whether the client's family, friends, or employer are present in the courtroom.

- f. Such information should be verified whenever possible.
- g. Whether or not the client is detained, counsel should describe the court procedures and counsel's obligation regarding the attorney/client privilege. Counsel should explain the client's rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should specifically advise the client not to discuss the case or any of the facts surrounding it with anyone, including family members, friends and fellow prisoners, unless counsel advises otherwise. Counsel should inform the client of the right to request that his/her attorney be present at any interview or questioning.

2.3 Bail or Detention Hearing

- a. Counsel has an obligation to vigorously attempt to secure the pretrial release of the client under conditions most desirable to the client. While favorable release conditions are the principal goal of the hearing, counsel should also be alert to all opportunities for obtaining discovery.
- b. Counsel's argument to the court should include the client's ties to the community and other factors that support a conclusion that the client, if released, will return for future court appearances. The client should not, except in the judgment of very experienced counsel, under the most extraordinary circumstances, testify at a bail hearing. Although comments on the strength and quality of the Commonwealth's case are appropriate and reference may be made to the general nature of the anticipated defense, the specific elements of the client's defense should not be revealed at the arraignment or bail hearing. Counsel should, where appropriate and helpful, identify people who are in the courtroom on behalf of the client.
- c. Counsel should be prepared to address the special issues of "dangerousness" that are the focus of hearings under G.L. c. 276, §58A, and, where appropriate and possible, be ready to present proffers that address those issues. Counsel should be prepared to address the issue of bail revocation pursuant to G.L. c. 276, §58. Counsel should also be prepared to address the issue of detention related to a preliminary probation violation hearing.
- d. Counsel should consider advocating for reasonable conditions of release or recognizance pursuant to pre-trial probation G.L. c.276, §87, such as electronic monitoring, stay away orders, curfews, mental health treatment, substance abuse treatment, surrender of passports or licenses (motor vehicle or firearms), etc., in addition to monetary sureties. Counsel must discuss these conditions of release with the client prior to suggesting them at the hearing.
- e. Where the client is not able to obtain release under the conditions set by the court, counsel should advise the client of his/her right to appeal under G.L. c.276, §§58, 58A and the advantages and disadvantages of doing so. Counsel should facilitate the bail appeal procedure, including, where appropriate, pressing for the right to be heard on the same day. Counsel should, whenever possible, be prepared to represent the client at the hearing. If counsel cannot represent the client at the bail appeal, s/he should assure that the counsel who does has all information necessary before proceeding with the bail appeal.
- f. Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court and the sheriff to any special needs of the client, e.g. medical problems, and request the court to order appropriate measures. Counsel should follow-up with the client and the facility to ensure that the client's needs are

being addressed.

2.4 Preliminary Discovery Issues/Prosecution Requests for Non-Testimonial Evidence

Counsel should carefully examine and seek copies of all pertinent and available court papers and police reports. If the police report is redacted, counsel should move for the names and addresses of all witnesses. Counsel should seek preservation and/or discovery of evidence (such as visible injuries) likely to become unavailable unless special measures are taken. Where appropriate, counsel should request court orders for preservation of evidence, e.g. "911" or turret tape recordings, notes of investigating officers, and biological/forensic evidence. Counsel should be aware of the potential for loss or destruction of evidence by forensic examination or testing and take appropriate steps to prevent or minimize it. Counsel should know and protect the client's rights governing the prosecution's efforts to require a defendant to submit to procedures for gathering non-testimonial evidence, such as lineups or other identification procedures, handwriting exemplars, physical specimens, etc.

2.5 Special Concerns

- a. Particularly if the client is detained, counsel should consider a prompt motion to dismiss any charge or aggravating element that is not supported by probable cause.
- b. Where appropriate, counsel should consider advantages and disadvantages of seeking cross-complaints.
- c. Counsel should consider obtaining funds at arraignment for an interpreter if the client does not speak English; an investigator, if immediate investigation of the allegations is necessary; and/or an expert (e.g. psychologist) if immediate psychological/psychiatric evaluation of the client is warranted. Otherwise, these motions may be filed at the pre-trial hearing date.
- d. Counsel should take advantage, where appropriate, of opportunities to interview witnesses who may be present in court. Counsel must avoid becoming a witness in his/her own case. Therefore, interviews of prosecution witnesses should be "witnessed" by another person (e.g. another defense attorney) to avoid later problems with proving an impeaching statement at trial.

III. PROBABLE CAUSE HEARING

3.1 Declination Hearing

Where, because of concurrent jurisdiction, a case may be heard in the District Court Department as either a trial or a probable cause hearing, counsel should consider which alternative is in the client's best interest and be prepared to argue that position persuasively to the court and prosecutor.

3.2 Probable Cause Hearing (Many of the standards in Sections V and VI apply also to this section.)

- a. Counsel should always seek to obtain a probable cause hearing and avoid a direct indictment unless good reasons exist for a different strategy.
- b. Where the client is entitled to a hearing, the attorney should insure that it is scheduled within thirty days, unless more time is needed to prepare, and delay will not increase the likelihood of direct indictment. Counsel should not waive this right without good reason.
- c. In order to prepare for the hearing, counsel must know the elements of all charges against the client and must investigate as fully as possible the facts underlying the charges.
- d. The probable cause hearing has a twofold purpose: to test the adequacy of the prosecution's case for binding over and to discover its strengths and weaknesses.
- e. Counsel should be certain that the proceedings are being adequately recorded. Counsel should be prepared to challenge the prosecution's showing of probable cause on each essential or aggravating element. Counsel should take advantage of the potential for discovery offered by a hearing by filing appropriate motions, using compulsory process, and sequestering witnesses. Counsel should not present evidence, especially the client's testimony, except in extraordinary circumstances where there is a sound tactical

reason that overcomes the inadvisability of disclosing the defense case at this stage.

- f. Where appropriate, counsel should consider advocating that the court retain jurisdiction over a lesser-included offense.
- g. As soon as practicable after the hearing, counsel should request a copy of the tape recording of the proceedings for possible use as impeachment at the trial and for trial preparation. It is counsel's responsibility to arrange for transcription of the tape.

IV. PRETRIAL PREPARATION

4.1 Investigation

Counsel should promptly investigate the circumstances of the case and explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities as well as from witnesses identified by the client or by others. Counsel should consider obtaining funds for an investigator to interview witness, while being aware of his/her reciprocal discovery obligations. Counsel should go to the scene of the alleged crime in a timely manner - prior to the pre-trial hearing, when necessary - or prior to an evidentiary hearing or trial. Counsel should consider obtaining fair and accurate photographs, fair and accurate maps of the area and, where relevant, measurements.

4.2 Probation Surrender Hearings

Counsel appointed to represent a client charged with violation of his/her probation should prepare in the same way and with as much care as for a trial. Counsel must request time to: conduct an in-person interview with the probationer; discover and review the Probation Department file; discover and review records of the probationer's participation in mandated programs; obtain expert assistance to test the validity of scientific evidence underlying the surrender (e.g. urinalysis results); identify, locate, and interview exculpatory or mitigating witnesses, etc. Counsel should consider selecting a date for the final hearing that allows the client sufficient time to work towards compliance with the conditions of probation.

Per District Court Rules for Probation Violation Proceedings, most judges will not allow the violation of probation hearing to track a new offense. Therefore, counsel must prepare for the final hearing based upon the facts of the new offense and familiarize him/herself with the case law regarding admissibility and sufficiency of hearsay in these proceedings. If counsel does not represent the client on the new offense, counsel should contact the attorney who does represent the client on the new offense to discuss the hearing, possible discovery issues, possible defenses and possible consequences of a finding of a violation of probation.

4.3 Pre-trial Motions and Affidavits

Counsel should file any motions that are strategically and legally appropriate. The decision to file motions should be made only after appropriate investigation (including client interview, examination of court documents and other material obtainable through informal means and summons) and researching relevant law. Counsel must be familiar with the requirements of the Massachusetts Rules of Criminal Procedure, including time limits and affidavit requirements. If more time is needed, it should be requested. Before filing a pretrial motion and affidavit, counsel should be aware of any adverse potential effects, such as its impact on the defendant's speedy trial rights or the opportunity it provides the Commonwealth to preview and strengthen a weak case. Counsel should also be aware of the adverse consequences that may attend the failure to file motions, such as waiver of rights or defenses. Affidavits should be drafted with care to protect the client's Fifth Amendment rights and to avoid disclosing trial strategy.

4.4 Pre-trial Conference Reports

If a pretrial conference is ordered, counsel should be cognizant of the requirements of Mass.R. Crim. P. 11. Counsel should carefully scrutinize and amend any pretrial conference forms to comport with fairness and case law and to protect the client's best interests. Counsel should amend pretrial conference report forms to accurately reflect counsel's reciprocal discovery obligations pursuant to Mass. R. Crim. P. 14 (a)(3) and relevant case law.

4.5 Discovery Motions

Among the discovery material counsel should consider seeking, through motions if necessary, are the following items that may be in the custody or under the control of law enforcement or other prosecution agents or agencies:

- a. details of all identification procedures, including examination of any photographs shown and selected;
- b. written and oral statements of defendant/co-defendant(s);
- c. copies of statements by potential witnesses;
- d. copies of all official reports, e.g., police, arson, hospital, results of any scientific test;
- e. inspection of physical evidence;
- f. list of potential witnesses and addresses;
- g. names and addresses of any witnesses, including proposed police officer experts, expected to offer expert opinions and the substance of their anticipated testimony (including their curriculum vitae/resume, materials used or relied upon in reaching their opinion and the factual and scientific basis for their opinion);
- h. probation records of all potential witnesses;
- i. copies of Grand Jury minutes;
- j. exculpatory evidence, identified as specifically as possible, and including promises, rewards, inducements made to witnesses;
- k. any other items that would be helpful in preparing and trying the case (e.g., audio or videotapes of interviews, booking, scenes, etc.).
- l. notice of prior or subsequent bad act evidence;
- m. notice of excited utterance evidence.

4.6 Reciprocal Discovery

Counsel must be familiar with the rules and developing body of case law regarding reciprocal discovery. Counsel must be aware of, consider, and thoroughly research any potential obligations and time limits regarding reciprocal discovery (Mass. R. Crim. P. 14(a)(3)).

4.7 Substantive Pretrial Motions

Among the motions that counsel should consider filing are:

- a. non-suggestive identification procedures (e.g., motion in opposition to a lineup or its equivalent, motion for testimony with client out of view, etc.);
- b. dismissal for unconstitutionality of the statute;
- c. dismissal for insufficiency of the complaint or indictment;
- d. dismissal for insufficiency of the evidence presented to the grand jury/magistrate resulting in indictment/complaint, or for impairment of the integrity of the grand jury;
- e. request for speedy trial or dismissal for lack of speedy trial either for violation of Rule 36 or on constitutional grounds;
- f. severance or joinder of defendants or charges;
- g. suppression of evidence obtained in violation of federal and Massachusetts law, i.e.
(1) illegally seized evidence, (2) statements not preceded by Miranda warnings or otherwise involuntary statements, (3) unrecorded confessions, (4) identifications procured by impermissibly suggestive procedures
- h. funds for experts, investigators, interpreters, etc., under G.L. c.261, §§27A-D. Counsel

- should consider retaining experts as consultants to aid in trial preparation, not only as witnesses. Counsel should be familiar with and ready to use the special appellate remedies provided for in these statutes.
- i. any other issues that are appropriate.

4.8 Trial Motions

Counsel should be aware that certain motions are generally reserved for the trial judge, e.g., motions in limine and motions to sequester.

4.9 Motion Hearings

When a dispute on a motion requires a hearing, counsel's preparation should include:

- a. investigation and discovery necessary to advance the claim, including visits to any scenes relevant to the subject matter of the motion;
- b. careful research of appropriate case law which supports or expands rights guaranteed by the federal and state constitutions and/or the Massachusetts Rules of Criminal Procedure;
- c. subpoenas for pertinent evidence and witnesses;
- d. full understanding of the burdens of proof and evidentiary rules;
- e. careful consideration of the benefits/costs of having the client testify;
- f. careful preparation of any witnesses who are called, especially the defendant;
- g. submission of a memorandum of law may be required, and in most cases is advisable.

4.10 Discovery compliance

Once counsel's discovery motions are allowed, if appropriate, counsel should seek prompt compliance and/or sanctions for failure to comply.

4.11 Interlocutory Relief

Where appropriate, counsel should consider seeking interlocutory relief, under the applicable Rule or statute, after an adverse pretrial ruling. The conduct of interlocutory hearings, including the submission of briefs and oral argument, are ordinarily the responsibility of trial counsel, whether the hearing was initiated by counsel or by the prosecution. Trial counsel handling an interlocutory appeal should contact the CPCS Director of Criminal Appeals-Private Counsel Division to determine whether assistance by appellate counsel is warranted.

4.12 Sentencing

Counsel should begin gathering information relative to possible sentencing.

V. DISPOSITIONS BY PLEA OR ADMISSION

5.1 Plea Negotiations

- a. After interviewing the client and developing a thorough knowledge of the law and facts of the case, the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts.
- b. Counsel should inform the client of any plea negotiations before they occur unless it is impractical to do

so, in which case counsel should inform the client of the negotiations as soon after they occur as is possible.

- c. The attorney shall make it clear to the client that the ultimate decision to offer a change of plea or admit to sufficient facts has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the client's situation. Such advice should not be based solely on the client's acknowledgement of guilt or solely on a favorable disposition offer.
- d. Where negotiations are begun, counsel should attempt to obtain the most favorable disposition possible for the client. The attorney shall keep the client informed of the status of the plea negotiations.

5.2 Client Decisions

- a. Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change his/her position. If the client remains unpersuaded, however, the attorney should assure the client that he/she will defend the client vigorously.
- b. Counsel must not attempt to unduly influence or coerce the accused into pleading guilty or to admitting to sufficient facts by any means, including, but not limited to, overstating the likelihood of conviction or potential consequences, or by threatening to withdraw from representing the accused if he/she decides not to accept the proposed agreement and to proceed to trial.
- c. Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case in the same manner as if it were to proceed to trial on the merits.

5.3 Preparation

- a. When a client decides to offer a change of plea, or admit to sufficient facts, counsel must be certain that the client understands all aspects of the plea agreement, if any, including sentencing recommendations, and is carefully prepared to participate in the procedures required under Mass. R. Crim. P. 12 and used in the particular court. Counsel shall also ascertain and advise the client of the court's practices concerning sentence recommendations and withdrawing pleas or admissions.
- b. Before advising the prosecution and court that the client is willing to offer a change of plea or an admission to sufficient facts, counsel must also be satisfied that the plea is voluntary, that the client understands the nature of the charges, that there is a factual basis for the plea or the admission, that the witnesses are or will be available, and that the client understands the rights being waived including: a trial with or without a jury where the Commonwealth has the burden of proving guilt beyond a reasonable doubt, the right to confront witnesses, and the privilege against self-incrimination.
- c. Counsel should negotiate the statement of facts with the prosecutor, advocating for language most favorable to the client. Counsel must also fully review the statement of facts with the client, and prepare him/her for the specific language to be used in court.

5.4 Consequences of Conviction

Counsel must also advise the client, prior to any change of plea, of the consequences of a conviction, including:

- a. the maximum possible sentence of all offenses;
- b. mandatory minimum sentences where applicable;
- c. different or additional punishments where applicable, such as for second offenses, probation violation or parole revocation consequences;
- d. potential liability for enhanced punishment after subsequent arrest (Counsel should be familiar with potentially applicable enhanced punishment statutes e.g. habitual offender, armed career criminal,

- second and subsequent offenses);
- e. possible Federal charges or penalty enhancements;
- f. conviction consequences for non-citizens (G.L. c.278, s. 29D);
- g. Sex Offender Registration Act (G.L., c. 6, ss. 178C et seq.) and DNA Seizure and Dissemination Act (G.L., c. 22E) requirements;
- h. parole eligibility (including the discretionary nature of parole decisions and that being eligible for parole does not confer a right to parole);
- i. potential civil liabilities;
- j. possible loss or suspension of driver's license;
- k. potential risk of the Commonwealth seeking civil detention pursuant to the SDP (sexually dangerous persons) law;
- l. potential risk of life time community parole;
- m. potential adverse consequences on the client's employment or education;
- o. possible immigration consequences including but not limited to deportation, denial of naturalization or refusal of reentry into the United States.

5.5 Necessity of Admission of Guilt

Where the proceeding is a final adjudication, counsel should not advise the client to plead guilty or admit to sufficient facts unless the client either admits guilt to counsel, or admits guilt to the court in a colloquy or tenders an Alford plea. During and after the change of plea colloquy, counsel must vigorously enforce all aspects of a plea agreement. Where a change of plea is contingent upon a specific agreement, counsel must be sure that the court is so informed before the tender of the plea, and that the agreement is duly recorded.

5.6 Disposition Argument

Notwithstanding a disposition by plea or an admission to sufficient facts, counsel must be prepared for sentencing arguments, including, where appropriate, release pending sentencing or appeal.

VI. TRIAL PROCEEDINGS

6.1 General Trial Preparation

- a. Counsel should consider all steps necessary to complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:
 - 1. summoning all potentially helpful witnesses, utilizing ex parte procedures if advisable (Mass. R. Crim. P. 17);
 - 2. summoning all potentially helpful physical or documentary evidence;
 - 3. arranging for defense experts to consult and/or testify on any evidentiary issues that are potentially helpful; e.g., testing of physical evidence, opinion testimony, etc.;
 - 4. obtaining and reading transcripts and/or prior proceedings in the case or related proceedings;
 - 5. obtaining photographs or preparing charts, maps, diagrams or other visual aids of all scenes, persons, objects, or information which may aid the fact finder in understanding the defense case, and preparing to secure the admission of such evidence through witnesses who will testify at trial.
- b. Where appropriate, counsel should have the following materials organized and accessible at the time of trial:

1. copies of all relevant documents in the case;
 2. relevant documents prepared by investigators;
 3. proposed voir dire questions;
 4. motions in limine;
 5. outline of opening statement;
 6. cross-examination plans for all possible prosecution witnesses;
 7. motion for required finding of not guilty, renewed motion for required finding of not guilty, and outline of argument for required findings of not guilty and authorities supporting it;
 8. direct examination plans for all prospective defense witnesses;
 9. copies of defense subpoenas;
 10. prior statements of all prosecution witnesses (e.g., Grand Jury minutes transcripts, police reports);
 11. prior statements of all defense witnesses;
 12. reports from defense experts;
 13. a list of all defense exhibits, and the witnesses through whom each will be introduced;
 14. proposed jury instructions with supporting case citations;
 15. copies of all relevant statutes and cases, including any potential lesser-included offenses;
 16. outline or draft of closing argument.
- c. Counsel should be fully informed of the rules of evidence, and the law relating to all stages of the trial process, and should prepare for all legal and evidentiary issues that can be anticipated in the trial.
- d. If it is beneficial, counsel should seek an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant, prior or subsequent bad acts, reputation testimony, excited utterances, prejudicial evidence) and, where appropriate, counsel should prepare motions in limine and memoranda for such advance rulings.
- e. Counsel should be alert to and understand the importance of establishing, for appellate purposes, a complete record of the trial proceedings, and to be fully informed of the applicable law and practices regarding:
1. preservation of each type of objection at every stage of the proceedings;
 2. offers of proof regarding evidence ruled inadmissible;
 3. recording of trial proceedings. Counsel should be aware that tape recordings of district court proceedings often prove to be inaudible or unreliable. Accordingly, counsel should make every attempt to obtain a stenographer, rather than rely only on a tape recording. G.L. c. 261, §27(c); c. 218, §27A.

6.2 Sequestration

Unless tactically inadvisable, counsel shall seek sequestration of all witnesses (including police) for trial (Mass. R. Crim. P. 21).

6.3 Bench Trial or Jury Trial

- a. The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel. See Section V., Dispositions by Plea or Admission; Section I., General Principles of Representation.
- b. Counsel should fully advise the client of the advantages and disadvantages of either a jury or jury-waived trial. Counsel should be knowledgeable about and advise the client of the practices of the judge before whom the case may be tried. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely responses to cross-examination.

6.4 Voir Dire and Jury Selection

a. Preparation

1. Counsel should be familiar with the law governing the selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire.
2. Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury, including Superior Court Rule 6, and should be alert to any potential legal challenges to these procedures.
3. Prior to jury selection, counsel should seek access to the juror questionnaires that have been completed by potential jurors.
4. Counsel should develop and file written voir dire questions tailored to the particular case in advance of trial.
5. Counsel should be familiar with the law concerning voir dire inquiries so as to be able to defend any request for particular questions.
6. Counsel should consider asking for extra peremptory challenges.
7. Counsel should be familiar with varied practices in this area (e.g. use of juror questionnaires and attorney-conducted voir dire) and should attempt to employ these where appropriate.

b. Examining Prospective Jurors

1. Counsel should be familiar with case law that requires individual voir dire in certain cases, e.g. inter-racial murder or sexual assault cases, sexual assault on children, insanity defenses.
2. Where appropriate, counsel should consider seeking permission to personally voir dire the panel, or at the very minimum, if the court poses questions, to ask follow-up questions.
3. When appropriate, counsel should request individual juror voir dire if the proposed voir dire questions may elicit sensitive information or expose prejudices. Counsel should be familiar with case law supporting such requests.
4. Counsel should be familiar with case law regarding the client's right to be present during individual voir dire. Counsel should fully discuss the risks and benefits of asserting this right with the client.

c. Challenges

1. Counsel should challenge for cause all persons about whom a legitimate argument can be made for prejudice or bias.
2. When challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors.
3. In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
4. Counsel should make every effort to consult with the client in exercising challenges.
5. Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.

6.5 Opening Statement

- a. Counsel should consider the strategic advantages and disadvantages of making an opening statement, of disclosing particular information during the opening, and of deferring the opening statement until the beginning of the defense case. Except in extraordinary circumstances, counsel should make an opening statement.
- b. Counsel should be familiar with the law governing opening statements, particularly in a case where

counsel does not plan to present any affirmative evidence. In addition, counsel should attempt to be familiar with individual trial judges' practices regarding the permissible content of opening statements.

c. Counsel's objectives in making an opening statement may include the following:

1. to provide an overview of the theory of the defense case;
2. to summarize the testimony of witnesses and the role of each in relationship to the entire case;
3. to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
4. to identify the weaknesses of the prosecution's case;
5. to remind the jury of the prosecution's burden of proof;
6. to clarify the jurors' responsibilities;
7. to personalize the client and counsel to the jury.

d. Counsel should record, and consider incorporating in the defense summation, promises of proof the prosecutor makes to the jury during his/her opening statement.

e. Counsel should be prepared to object to the prosecutor's opening statement if it is improper and to seek curative instructions or a mistrial.

6.6 Confronting the Prosecution's Case

a. Counsel should research and be fully familiar with all of the elements of each charged offense and should anticipate weaknesses in the prosecution's case.

b. Counsel should systematically analyze all potential prosecution evidence, including physical evidence, for evidentiary problems.

c. In preparing for cross-examination, counsel should make an effort to be familiar with the applicable law, procedures and techniques concerning cross-examination and impeachment of witnesses.

d. In preparing for and carrying out cross-examination, counsel should also:

1. develop a coherent and sensible theory of the case, along with the framework of the closing argument;
2. anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;
3. integrate into cross-examination the theory of the defense and closing argument;
4. consider whether cross-examination of each witness is necessary or likely to generate helpful information;
5. review and organize all prior statements and testimony of each witness;
6. be alert to inconsistencies and variations within each witness's testimony or contradictions (including material omissions) in prior statements by the witness;
7. be alert to significant omissions or deficiencies in the testimony of any witness;
8. consider using certified copies of prior convictions or pending cases of witnesses;
9. be alert to all issues relating to witness competency or credibility, including bias or motive for testifying;
10. be alert to potential 5th Amendment issues that apply to any witness;
11. elicit all facts to build and support the theory of defense.

e. If counsel is surprised by any statements or items which should have been provided in discovery, but were not, counsel should request adequate time to review these before commencing cross-examination and should consider seeking any possible sanctions.

f. Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case.

g. Unless it is clearly frivolous, counsel should move at the close of the prosecution's case and out of the presence of any jury for a required finding of not guilty on all charges and/or any aggravating element, where appropriate. For cases that have strong legal issues to support counsel's argument, counsel should

research the applicable case law and prepare, in advance, a memorandum in support of his/her motion. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

6.7 Presenting the Defense Case

- a. Counsel should develop, in consultation with the client, a sensible overall defense strategy. Counsel should consider and advise the client whether the client's interests are best served by not offering testimony or evidence, but by relying on the prosecution's failure to meet its burden of proof instead.
- b. Counsel should discuss with the client all of the considerations relevant to the client's decision whether to testify (including the likely areas of cross-examination and impeachment).
- c. Counsel should understand both the elements and tactical considerations of any affirmative defense, and should know whether the client bears a burden of persuasion or a burden of production.
- d. In preparing for presentation of a defense case, counsel should, where appropriate:
 1. consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;
 2. after discussion with the client, make the decision whether to call any witnesses;
 3. develop a plan for direct examination of each potential defense witness;
 4. determine the implications that the order of witnesses may have on the defense case;
 5. consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;
 6. consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution;
 7. consider the use of physical or demonstrative evidence and the witnesses necessary to admit it;
 8. attempt to obtain the prior records of all defense witnesses.
- e. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- f. Counsel should prepare all witnesses for all foreseeable direct and cross-examination. Counsel should also advise witnesses of suitable courtroom dress, demeanor and procedures, including sequestration.
- g. Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.
- h. Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.
- i. If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and/or make an offer of proof.
- j. Counsel should guard against improper cross-examination by the prosecutor.
- k. Counsel should conduct re-direct examination as appropriate.
- l. At the close of the defense case, counsel should renew any previously filed motions for a required finding of not guilty on each count charged and/or aggravating element.
- m. Counsel should keep a record of all exhibits identified or admitted.

6.8 Closing Argument

- a. Before argument, counsel must file and should seek to obtain rulings on all requests for instructions (see Mass. R. Crim. P. 24(b) and 26) in order to tailor or restrict the argument properly in compliance with the Court's rulings.
- b. Counsel should be familiar with the law and the individual judge's practice concerning time limits, objections and substance of closing arguments.
- c. In developing closing argument, counsel should review the proceedings to determine what aspects can be

used and persuasively argued in pursuit of the defense theory of the case. Counsel should consider:

1. highlighting weaknesses in the prosecution's case, including what potential corroborative evidence is missing, especially in light of the prosecution's burden of proof;
 2. favorable inferences to be drawn from the evidence;
 3. incorporating into the argument:
 - a. helpful testimony from direct and cross-examinations;
 - b. verbatim instructions drawn from the expected jury charge;
 - c. responses to anticipated prosecution arguments;
 4. the effects of the defense argument on the prosecutor's possible rebuttal argument.
- d. counsel should consider incorporating in his/her summation the promises of proof the prosecutor made to the jury during his/her opening.
- e. Whenever the prosecutor exceeds the scope of permissible argument, counsel must object (either immediately or at the conclusion of the argument), consider requesting a mistrial, or consider seeking cautionary instructions. Counsel should weigh strategic considerations in deciding whether to object during or after the prosecutor's closing argument.

6.9 Jury Instructions

- a. Counsel must file proposed or requested jury instructions before closing argument.
- b. Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges, and preserving objections to the instructions.
- c. Counsel should submit both standard and modified jury instructions tailored to the particular circumstances of the case and should provide case law in support of the proposed instructions.
- d. Where appropriate, counsel should object and argue against instructions proposed by the prosecution.
- e. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of the proposed instructions or reading the proposed instructions into the record.
- f. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions. After the charge, counsel should object on a timely basis to deviations and any other instructions unfavorable to the client, and, if necessary, request additional or curative instructions.
- g. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge give counsel a meaningful opportunity to be heard (outside the jury's presence) on the supplemental instruction before it is delivered.

6.10 Taking Verdicts

Counsel should be alert to any improprieties in the verdict and consider requesting that the jury be polled.

VII. SENTENCING

7.1 Preparation

Defense counsel should be familiar with and consider:

- a. the statutory penalties for each possible conviction, including each lesser-included offense and any repeat offender penalties;
- b. the official version of the client's prior record, if any;
- c. the position of the probation department with respect to the client;
- d. the sentencing recommendation and memorandum, if any, of the prosecutor's;
- e. seeking the assistance of an expert - either through community resources, G.L. c.261, §§27A-G, or the Committee for Public Counsel Services;
- f. the collateral consequences attaching to any possible sentence, e.g., parole or probation revocation, immigration consequences, later exposure as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender Registration, DNA Seizure, lifetime community parole, or civil forfeiture of property;
- g. the sentencing practices of the judge, to the extent they may be determined;
- h. the sentencing guidelines, as they would apply to the case;
- i. referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital as an aid to sentencing under G.L. c.123, §15(e);
- j. any victim impact statement to be presented to the court;
- k. any other report to be presented to the court in aid of sentencing;
 - l. seeking an evidentiary hearing, e.g., restitution amount;
- m. requesting a continuance for sentencing at a later date;
- n. any other information or proposals that may be helpful to the client.

7.2 Prosecution and Probation Recommendations

Counsel should advocate in advance of trial or sentencing for a favorable recommendation from both the prosecutor and the representative of the probation department.

7.3 Pre-sentence reports

- a. Counsel should be familiar with the practices of the court and its probation department relative to pre-sentencing reports. Counsel should consider requesting one where, after consultation with the client, s/he has good reason to believe that it would be helpful.
- b. Counsel shall determine the accuracy and completeness of all sentencing reports and statements and should be prepared to challenge any incorrect information or omissions and take steps to correct these before prejudice occurs.
- b. Counsel should carefully prepare the client for, and attempt to attend, any pre-sentence interview to be conducted in aid of sentencing. Counsel should advise about the client's Fifth Amendment rights, if appropriate.

7.4 Defense recommendations

- a. Counsel should carefully consider and discuss with the client any sentencing recommendation to be made by the defense and the reasons for them. If appropriate, counsel should discuss any recommendations with other experienced defense counsel. Counsel should explore all reasonable alternatives to incarceration, e.g., community services, rehabilitative programs, restitution.
- b. Where tactically advisable or requested by the court, counsel should prepare a sentencing memorandum, presenting every factual and legal ground that will assist in reaching the most favorable disposition obtainable.
- c. At sentencing, counsel should zealously advocate the best possible disposition, including a request for continuance without a finding, especially in an admission to sufficient facts if the client has no record. Counsel should take whatever steps are necessary, including, where appropriate, the presentation of documentary evidence and witnesses; e.g., reports or testimony from employers, community representatives, therapists/counselors, and family.
- d. Where appropriate, counsel should carefully prepare the client or a close relative to address the court.

7.5 Dispositions

- a. Counsel should be alert to, and challenge by hearing if necessary, any inappropriate conditions of probation, including the amount of restitution.
- b. Counsel should request a reasonable time period for the payment of any fines or restitution. If appropriate, counsel should request that a hearing be held to determine the amount of restitution and should represent the client at that hearing.
- c. Counsel should fully explain the foreseeable consequences of the sentence, including any conditions of probation and the consequences of violating probation.
- d. Counsel should insure that the sentence accurately reflects the rights of the client for parole eligibility and jail credit.
- e. Counsel should consider requesting specific orders or recommendations from the court, including, but not limited to, the place or conditions of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, and recommendations against deportation.
- f. Counsel should be familiar with the statutes and case law concerning jail credit. Counsel should ensure that the mittimus accurately reflects any jail credit to which the client is legally entitled. Trial counsel should be available to correct an error in the mittimus discovered at a later date.

7.6 Sentence Appeals

- a. In Superior Court cases, trial counsel should advise the client of any right to appeal his/her state prison sentence to the Appellate Division of the Superior Court and should implement the client's decision. Trial counsel should represent the client at the hearing.

VIII. POST-TRIAL PROCEEDINGS

(See CPCS Standards for Appellate Representation.)

8.1 Appellate Rights

- a. Counsel should advise the client, after sentencing, about the right to file a motion to revoke and revise the sentence. Counsel should explain the value of filing the motion to enable the court to fashion an equitable disposition in future proceedings. Counsel should file such motion in a timely fashion, pursuant to Mass. R. Crim. P. 29, if requested to do so by the client or, if appropriate to protect the client's interests.
- b. After advising the client of the right to appeal, trial counsel should implement the client's decision in that regard. If an appeal is taken, trial counsel should file in a timely fashion the appropriate notice and request either a tape or transcript of all prior court proceedings.
- c. Where there is an appeal, counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration.

8.2 Continuing Duty to Represent

- a. Trial counsel should file a Motion to Withdraw and a Motion for Appointment of Substitute Counsel on Appeal so that appellate counsel will be appointed. Trial counsel should assure that these motions are acted upon by the court.
- b. Counsel retains responsibility for the case until and unless another attorney assumes that responsibility. Trial counsel should fully cooperate with successor counsel including prompt provision of the trial file that includes all work product. Upon request of the client, trial counsel will provide a copy of said trial file.

COMMITTEE FOR PUBLIC COUNSEL SERVICES
PERFORMANCE GUIDELINES GOVERNING
REPRESENTATION OF INDIGENT JUVENILES IN
DELINQUENCY, YOUTHFUL OFFENDER, AND CRIMINAL CASES *

These guidelines are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these guidelines and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these guidelines and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

* These Guidelines have been written so that the practitioner need not reference the Guidelines Governing Representation of Indigents in Criminal Cases, which have essentially been incorporated where appropriate. On criminal matters (e.g., 14-16 year olds charged with murder), consideration of the Guidelines Governing Representation of Indigents in Criminal Cases is still appropriate.

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- IX. Post-Trial Proceedings

I. GENERAL PRINCIPLES OF REPRESENTATION

J 1.1 Role of Defense Counsel

Counsel's role in the criminal justice system is to insure that the interests and rights of the client are fully protected and advanced. Counsel's personal opinion of the client's guilt is totally irrelevant. The client's financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney. Counsel must know and adhere to all applicable ethical opinions and standards and comply with the rules of the court. Where appropriate, counsel may consider a legal challenge to inappropriate rules and/or

opinions. If in doubt about ethical issues in a case, counsel should seek guidance from other experienced counsel or from the Board of Bar Overseers. Counsel shall interpret any good-faith ambiguities in the light most favorable to the client.

The role of counsel in delinquency and Youthful Offender (YO) cases is to be an advocate for the child. Counsel should insure that the interests and rights of the client are fully protected and advanced, irrespective of counsel's opinion of the client's culpability. This requires fully explaining to the juvenile the nature and purpose of the proceedings, using language that is appropriate to your client's age and mental capabilities, and the general consequences of the proceedings, seeking all possible aid from the juvenile on decisions regarding court proceedings. Counsel should also fully explain to the juvenile all court proceedings, as well as all his/her rights and defenses, using language that is appropriate to the client's age and mental capabilities. Upon appointment, counsel should first seek to meet separately with the juvenile out of the presence of the parent.* Counsel should not discuss any attorney-client privileged communications with the parent, or any other person, without the express permission of the juvenile. Counsel should advise the juvenile of the above at the onset of the attorney-client relationship. Counsel should fully inform both the juvenile and the juvenile's parents about counsel's role, especially clarifying the lawyer's obligation regarding confidential communications, using language that is appropriate to the client's age and mental capabilities. The lawyer should counsel the juvenile, present the juvenile with comprehensible choices, help the juvenile reach his own decisions and advocate the juvenile's viewpoint and wishes (as determined by the juvenile) to the Court. Counsel should refrain from waiving substantial rights or substituting his own view, or the parents' wishes, for the position of the juvenile.

* The use of the word parent hereafter refers to parent, guardian, custodial adult or person assuming legal responsibility for the child.

J 1.2 Education, Training and Experience of Defense Counsel

To provide competent representation, counsel must be familiar with Massachusetts criminal law and procedure, including changes and developments in the law. It is counsel's obligation to remain current with changes in the statutory and decisional law. Counsel should participate in skills training and education programs in order to maintain and enhance skills. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept the more serious and complex delinquency or youthful offender cases only after having had experience and/or training in less complex criminal/delinquency matters. Where appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, probation officers, and other court personnel.

To provide competent representation in delinquency and YO matters, counsel must be familiar with G.L. c. 119, particularly sections 53-84 and G.L. c. 120 as well as relevant case law. Counsel should also be cognizant of the roles of the Departments of Youth Services (DYS), Social Services (DSS), Mental Retardation (DMR), and Mental Health (DMH). Counsel should be aware of the various service delivery systems and placement processes. Counsel should have a working knowledge of the law regarding: DYS classification procedures, Children in Need of Services (CHINS), Care and Protection, school suspension and expulsion, special education, and DSS Fair Hearings. Counsel should be aware that each of these other areas of law and social service systems has a potential overlap with the delinquency/youthful offender proceedings.

J 1.3 General Duties of Defense Counsel

The role of counsel is to insure that the juvenile is afforded due process. Counsel should assert all rights and raise all issues in the context of the case where strategically appropriate. This includes the filing of motions, with supporting affidavit and memoranda and handling the delinquency or youthful offender proceedings generally in accordance with the standards for performance in criminal proceedings.

- a) Counsel's primary and most fundamental responsibility is to promote and protect the interests of the client. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case. If personal reactions make it impossible for counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client.
- b) Counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. When counsel is assigned to represent a new client and the client is held in custody (e.g., detention center or other place of commitment for alcohol/drug or mental health evaluation), counsel should immediately write DYS a letter informing the agency that the client is represented by counsel, and that under no circumstances may anyone from the police, prosecutor, or Commonwealth speak with the client without counsel. In all cases where the client is held in custody, counsel should visit the client within three business days of receiving the assignment. In those instances when it will not be possible for counsel to see a new in-custody client within three business days of assignment, the attorney must: (1) write to the client within three business days of receiving the assignment and advise the client that s/he has been assigned to the representation and also inform the client of the date upon which counsel will visit the client; (2) if appropriate, provide the client with a copy of discovery received in the case; and (3) counsel should call the DYS facility where his/her client is detained and speak to the client and inform the client of when he/she can expect a visit. Counsel should contact the juvenile within 24 hours of receiving an appointment. Counsel should also assure him/herself that the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. The client must be given adequate time to fully apprise counsel of the evidence and defenses in his/her case. Counsel must also arrange for prompt and thorough consultation with the parent or guardian, said consultation to be within parameters established by the client.
- c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting an appointment. Counsel must maintain an appropriate, professional office in which to consult with clients and witnesses and must maintain a system for receiving regular collect telephone calls from incarcerated clients. Counsel must provide incarcerated clients with directions on how to contact the office via collect telephone calls (e.g., what days and/or hours calls will be accepted). It is recommended that counsel anticipate that juvenile clients will require more contact between court dates than the average adult client.
- d) Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client. As part of this file, counsel should maintain a "running sheet" or log which records information such as information obtained during all interviews of the client; interviews of witnesses, interviews of family members, friends and employers; client's background and history; court dates and events; contact with investigators and results of investigations; conversations with the prosecutor regarding discovery, dispositional issues including plea offers, trial issues; conversations with the probation officer, lobby conferences or conversations with a judge; conversations with police officers or Commonwealth investigators; telephone conversations regarding the case; conversations, consultation and evaluation by experts, etc.
- e) Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client. Such conflicts should be avoided where possible or addressed in a timely manner.
- f) The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to plead delinquent or not delinquent and to change such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal; and whether to waive his/her right to a speedy trial.
- g) The attorney should explain that final decisions concerning trial strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney's decision-making role in this regard is consideration of the client's input and full disclosure by the

attorney to the client of the factors considered by the attorney in making the decisions. Counsel should inform the client of an attorney's ethical obligation, informed by professional judgment, not to present frivolous matters.

- h) Counsel's obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel and must, upon request, promptly provide successor counsel with the client's entire case file, including work product.
- i) Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.
- j) Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared. Counsel should follow appropriate court practices to minimize inconvenience to any individuals.
- k) Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g., motions to change venue, etc.
- l) Where counsel is unable to communicate with the client or his or her guardian because of language differences, the attorney shall take whatever steps are necessary to insure that he/she is able to communicate with the client and that the client is able to communicate his/her understanding of the proceedings. Such steps would include obtaining funds for an interpreter to assist with pre-trial preparation, interviews, and investigation, as well as in-court proceedings.
- m) Where counsel is unable to communicate with the client because of mental disability, the attorney shall obtain expert assistance for an evaluation of the client to determine what steps, if any, can be taken to improve communication and understanding to acceptable levels. If no steps can be taken, counsel should address the court on the issue of the client's competence.
- n) Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client and the court, and to minimize inconvenience to others.
- o) Counsel may request the appointment of a guardian ad litem, or may elect not to oppose such an appointment, only when very unusual circumstances warrant such an appointment. Every effort should be made to limit the role of the guardian ad litem to the minimum required for him/her to accomplish the purpose for which the appointment was made. In most cases both the guardian and the client should be instructed not to discuss the facts of the case as this discussion may not be privileged.

II. PRELIMINARY PROCEEDINGS & PREPARATION

J 2.1 Arraignment

- a) Counsel should be familiar with the bail laws, including the legal standards the court may consider in setting the conditions of release (G.L. c. 276, § 58) as well as the procedure for appeal of the court's decision. If the nature of the offense and/or the client's record indicate that the client may not be released on personal recognizance, counsel should insist on an opportunity to interview the client and conduct an appropriate investigation before the court considers setting bail. Before interviewing the client, counsel should examine the complaint and/or indictment and inform the client of the exact charges, should review the police report(s), and should review the client's probation [CORI] record, paying particular attention to any alleged convictions, incarcerations, defaults, pending cases, open probation matters and open restraining orders, and ascertain what other relevant information may be in the possession of the probation department or prosecution.

- b) Counsel should familiarize him/herself with the particular arraignment practices of each session in which s/he appears. For example some courts routinely obtain school attendance records at arraignment.
- c) In addition to meeting with the juvenile client, counsel should determine whether a parent is at the court in connection with the juvenile proceeding. Counsel should ascertain the adult's ability and willingness to assume custody of the juvenile or to post bail for the juvenile. Counsel should be aware that the court will usually release a juvenile to the care and custody of a parent. Counsel should also be aware that most juvenile courts will not release a juvenile without an apparently responsible adult in court willing to take custody. Every effort should be made to locate and contact such a responsible adult if none are present.
- d) Counsel should be familiar with the law regarding pre-trial detention on the grounds of dangerousness (G.L., c. 276, § 58A). If the Commonwealth moves for a hearing to determine whether or not the client should be detained, counsel should determine whether or not there is a legal basis for such a motion. Counsel should seek to minimize the amount of time the client is held prior to a detention hearing. In preparing for a detention hearing, counsel should consider the wisdom and consequences of summoning witnesses including the complainant.
- e) In addition, counsel should be familiar with the law regarding bail revocation, pursuant to G.L. c. 276, s. 58 and be prepared to raise constitutional issues. If the Commonwealth moves to revoke the client's bail on another case due to the new offense, counsel should determine whether or not there is a legal basis for such a motion. Counsel should be prepared to argue that the client facing bail revocation is entitled to the same process and the Commonwealth has the same burden of proof by clear and convincing evidence as a client facing s.58A preventive detention. Counsel should insist upon a hearing, notice and time to prepare and subpoena witnesses.
- f) Counsel should strongly advise the client not to waive any significant rights at this proceeding, including whether to proceed with a jury trial or to have the case heard in the bench trial division.
 - 1. A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare circumstances, and if the attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later, especially one which does not involve a criminal record such as diversion, drug evaluation under G.L. c. 111(e), mediation, or a continuance without a finding. However, counsel should be aware of potential immigration consequences of a continuance without a finding, which may be considered a conviction for immigration purposes.
 - 2. Where strategically appropriate and especially if the client may be held on bail, counsel should request a trial or pretrial hearing as soon as practicable within fifteen (15) days (G.L. c. 119, § 68). Counsel must discuss with the client his/her right to return to court within fifteen (15) days and may waive this right only after discussion with the client of the pros and cons of such a waiver.
 - 3. Counsel should be aware of G.L. c.119, §68A regarding pretrial evaluation of a juvenile. Counsel should consider and protect the juvenile's rights relative to confidentiality, evidentiary, and tactical issues.
- g) Counsel should be thoroughly familiar with the law and court practices regarding competence to stand trial and criminal responsibility (G.L. c. 123, §§ 15(a) and 15(b); Mass. R. Crim. P. 14). Counsel should also be aware of, and protect, the client's statutory and constitutional rights with respect to such competency examinations. Counsel should be aware that children present special competency and criminal responsibility issues and should be alert for these issues. Counsel who is appointed to represent the client for bail only should give special consideration to these issues and should rarely, if ever, agree to such a commitment at the time of the client's arraignment.

- h) Counsel should insure that every client (and parent) is provided with a card noting the next court date, an office appointment date, any other important dates, as well as complete information on how to contact the attorney.
- i) The assigned defense trial counsel should represent the client at any competency hearing arising in the case.

J 2.2 Initial Interview and Preparation for Bail Hearing

- a) The scope and focus of the initial interview will vary according to the circumstances under which it occurs. A meeting or conversation conducted in a courthouse hallway or lockup is not a substitute for a thorough interview conducted in private.
- b) If identification may be an issue, counsel should be aware of, and consider preventing, any identification opportunities for prosecution witnesses that may arise at arraignment.
- c) If the client may be detained, the focus of the initial interview and investigation will be to obtain information relevant to the determination of bail and/or pretrial conditions of release. Such information should generally include:
 - 1. client's residence and length of time at that residence;
 - 2. family (names, addresses and phone numbers);
 - 3. health (mental and physical) and employment background;
 - 4. explanation of any court defaults and any other information on the record;
 - 5. probation/DYS/CHINS status;
 - 6. possible sources of bail money;
 - 7. the general circumstances of the alleged offense and/or arrest, including, where relevant, any identification procedures that occurred;
 - 8. client's legal custody (parent, family, state agency) and physical custody (person responsible to supervise client) - names, addresses and phone numbers;
 - 9. client's school placement, (G.L. c. 71B); status, attendance, special ed. designation;
 - 10. possible adults willing to assume responsibility for the juvenile and/or post bail;
 - 11. the names and addresses of any agencies involved with the child and/or parent, e.g. DSS worker, DMH worker, community health center, etc.;
 - 12. the client's reputation in the community; and
 - 13. whether the client's family, friends, or employer are present in the courtroom.
- d) Such information should be verified whenever possible.
- e) Whether or not the client is detained, counsel should describe the court procedures and counsel's obligation regarding the attorney/client privilege. Counsel should explain the client's rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should

specifically advise the client not to discuss the case or any of the facts surrounding it with anyone, including family members, friends, and fellow prisoners, unless counsel advises otherwise. Counsel should inform the client of the right to request that his/her attorney be present at any interview or questioning.

- f) Counsel should obtain signed releases by the client and parent for mental health records, school records, DSS records, DYS records, employment records, etc. Counsel should advise the client of the potential use of this information and the privileges that attach to this information

J 2.3 Bail or Detention Hearing

- a) Counsel has an obligation to vigorously attempt to secure the pretrial release of the client under conditions most desirable to the client. While favorable release conditions are the principal goal of the hearing, counsel should also be alert to all opportunities for obtaining discovery.
- b) Counsel's argument to the court should include the client's ties to the community and other factors that support a conclusion that the client, if released, will return for future court appearances. The client should not, except in the judgment of very experienced counsel, under the most extraordinary circumstances, testify at a bail hearing. Although comments on the strength and quality of the Commonwealth's case are necessary and appropriate and reference may be made to the general nature of the anticipated defense, the specific elements of the client's defense should not be revealed at the arraignment or bail hearing. Counsel should, where appropriate and helpful, identify people who are in the courtroom on behalf of the client.
- c) Counsel should be prepared to address the special issues of dangerousness that are the focus of hearings under G.L. c. 276, § 58A, and, where appropriate and possible, be ready to present proffers that address those issues. Counsel should be prepared to address the issue of bail revocation pursuant to G.L. c. 276, § 58. Counsel should also be prepared to address the issue of detention related to a preliminary probation violation hearing.
- d) Counsel should consider and advocate for reasonable conditions of release or recognizance such as pre-trial probation, electronic monitoring, stay away orders, curfews, mental health treatment with appropriate protective orders, substance abuse treatment with appropriate protective orders, surrender of passports or licenses (motor vehicle or firearms), etc., in addition to monetary sureties. Counsel must discuss these conditions of release with the client prior to suggesting them at the hearing.
- e) G.L. c. 276, § 58 controls both juvenile and adult proceedings. Counsel should be aware that the statute provides for a presumption of personal recognizance. The focus of the bail hearing should be whether the juvenile will appear for further court proceedings. Counsel should oppose any bail order which is in the nature of preventive detention, such as "DSS or DYS only cash bail," or any bail order where the purpose of detention is ostensibly for treatment. Counsel should be careful in considering whether a parent only cash bail is tantamount to preventive detention.
- f) Even if release is not affected, counsel should advocate for the least amount of bail. The amount of bail and type of charge may determine the type of facility where the juvenile will be held, i.e., lower bail may result in a less restrictive setting within DYS.
- g) Bail appeals must be considered in every case where bail is imposed and the client is detained.
- h) Where the client is not able to obtain release under the conditions set by the court, counsel should advise the client of his/her right to appeal under G.L. c. 276, §§ 58 and 58A and the advantages and disadvantages of doing so. Where appropriate, counsel should facilitate the bail appeal procedure, including pressing for the right to be heard on the same day and be prepared to represent the client at the hearing. It is crucial that counsel learn the bail appeal procedures applicable to each jurisdiction in which they practice. If counsel cannot represent the client at the bail appeal, s/he should assure that the counsel who does has all information necessary before proceeding with the bail appeal.

- i) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court, the sheriff, and DYS to any special needs of the client, e.g. medical problems, and request the court to order appropriate measures. Counsel should follow-up with the client and the facility to ensure that the client's needs are being addressed.
- j) Counsel should be aware that juveniles can be released on bail or personal recognizance, and with his/her consent placed on pre-trial probation pursuant to G.L. c. 276, § 87. Counsel should protect the client's rights at this important stage. Counsel should make sure that if conditions are imposed they should be reasonable. Counsel should fully explain the conditions to the client in language that is appropriate to the client's age and mental capabilities, and the client should be able to communicate his/her understanding of these conditions. If there is a violation of the conditions, counsel should be aware of the procedures for revoking bail. Jake J. v. Commonwealth, 433 Mass. 70 (2000).

J 2.4 Preliminary Discovery Issues/Prosecution Requests for Non-Testimonial Evidence

- a) Counsel should carefully examine and seek copies of all pertinent and available court papers and police reports. If the police report is redacted, counsel should move for the names and addresses of all witnesses. Counsel should seek preservation and/or discovery of evidence (such as visible injuries) likely to become unavailable unless special measures are taken. Where appropriate, counsel should request court orders for preservation of evidence, e.g. "911" or "turret" tape recordings, notes of investigating officers, and biological/forensic evidence. Counsel should be aware of the potential for loss or destruction of evidence by forensic examination or testing and take appropriate steps to prevent or minimize it. Counsel should know and protect the client's rights governing the prosecution's efforts to require a defendant to submit to procedures for gathering non-testimonial evidence, such as lineups or other identification procedures, handwriting exemplars, physical specimens, etc.
- b) Counsel should be aware that G.L. c. 119, §55A requires that discovery be in writing, and counsel should request that this requirement be honored.

J 2.5 Special Concerns

- a) Particularly if the client is detained, counsel should consider a prompt motion to dismiss any charge or aggravating element that is not supported by probable cause.
- b) Where appropriate, counsel should consider the advantages and disadvantages of seeking cross-complaints.
- c) Counsel should be aware of the special privacy considerations given a juvenile; i.e., G.L. c. 119, § 65 requires that all delinquency hearings be closed to the general public.
- d) Counsel should be aware that delinquency papers are not public documents; however they can be released with the consent of the court. After two findings of delinquency on felony charges, the probation officer may make public the juvenile's name when the juvenile is charged with a third felony. (See G.L. c. 119, § 60A). Youthful Offender cases are not open to the public until the juvenile has actually been indicted.
- e) Counsel should consider obtaining funds for an interpreter, investigator, expert (e.g., psychologist) at arraignment if the client does not speak English, immediate investigation of the allegations is necessary, or immediate psychological/psychiatric evaluation of the client is warranted. Otherwise, these motions may be filed at the pre-trial hearing date.
- f) Counsel should take advantage, where appropriate, of opportunities to interview witnesses who may be present in court. Counsel must avoid becoming a witness in his/her own case. Therefore, interviews of

prosecution witnesses should be “witnessed” by another person (e.g. another defense attorney) to avoid later problems with proving an impeaching statement at trial.

III. TRANSFER HEARING PURSUANT TO G.L. c. 119, § 72A

Transfer generally only arises in the context of G.L. c. 119, § 72A. This statute controls the prosecution of cases in which the alleged act took place prior to the defendant’s 17th birthday, but he/she was not “apprehended” until after his/her 18th birthday. The decision whether to prosecute the defendant as an adult or to discharge him/her has dramatic consequences. Counsel should prepare accordingly.

J 3.1 Initiation of Transfer Hearing Request

Counsel should be prepared to argue strenuously to the court, as well as to the assistant district attorney, that the case should not be heard as a transfer hearing under G.L. c. 119, § 72A, because the Commonwealth made an inadequate effort to bring the defendant into court before his/her 18th birthday or because such a proceeding would not be in the interests of justice.

J 3.2 Transfer Hearing - Part A

- a) Counsel should be aware that transfer under G.L. c. 119, § 72A, requires the judge to make a finding of probable cause that the defendant committed the charged offense. Counsel should always seek a complete and recorded probable cause hearing except in the most extraordinary circumstances. Counsel should order a copy of the tape or transcript. In many courts it will be appropriate to request a stenographer to assure a record of the hearing, given the poor quality of the recording systems throughout the state. Counsel should also argue that there is no statutory provision for substituting Grand Jury minutes for a hearing and that even if the Grand Jury minutes are admitted into evidence the defendant is still entitled to cross-examine the Commonwealth’s witnesses and call any other relevant witnesses.
- b) Counsel should refer to section IV, Probable Cause Hearings of the Standards for Criminal Practice, for other issues relating to preparation for the hearing.

J 3.3 Transfer Hearing-Part B

- a) Counsel should be aware of the statutory findings (protection and interests of the public) that G.L. c. 119, § 72A requires the judge to make. Counsel should be prepared to argue that the judge should consider, but is not limited to, the following factors: (i) the seriousness of the alleged offense; (ii) the child’s family, school and social history, including his court and juvenile delinquency record, if any; (iii) adequate protection of the public; (iv) the nature of any past treatment efforts for the child; and (v) the likelihood of rehabilitation of the child. Commonwealth v. A Juvenile, 16 Mass. App. Ct. 251 (1983).
- b) Counsel must have up-to-date knowledge of the statutory and case law governing these findings.
- c) Counsel shall, at a minimum, review, and unless inappropriate, obtain copies of the client’s psychosocial evaluations, social services records, psychological reports and evaluations, placement or program evaluations and reports, school records, and medical history. Protective orders concerning access to and prosecutorial use of such information should be requested. Counsel should consider moving under G.L. c. 261, §§ 27A-G, *ex parte*, if possible, for independent evaluations, reports and histories. Counsel shall also facilitate and make substantial efforts to secure services through school, community agencies, DSS, DYS, or DMH, as appropriate.
- d) Counsel should be prepared to present testimony by people who can provide helpful insight into the client’s character, including: teachers, athletic personnel, counselors, DYS counselors, psychologists, community

members, probation officers, religious affiliates, employers, or other persons with a positive personal and/or professional view of the defendant.

- e) Counsel should be certain that all Part B proceedings are recorded. Counsel's file should contain notes of names, addresses and essential testimony at the Part B proceeding. Due to the inadequacies of recording systems and the importance of the hearing, counsel should consider a motion for funds to obtain a court reporter. See *Performance Guidelines Governing Representation of Indigents in Criminal Cases*, 6.1e(3).
- f) Counsel shall order the tape or transcript of Part A & B proceedings.
- g) Counsel should request written findings of fact by the Court, should the case be transferred to adult court.

J 3.4 Post Transfer Responsibilities

- a) After dismissal of the juvenile complaints, the youth is arraigned on adult charges; counsel should be prepared to argue bail.
- b) Counsel shall carefully review the judge's findings to determine if the order of transfer is deficient. Where findings are deficient, counsel should file a Motion to Dismiss and/or Remand to Juvenile Court under G.L. c. 277, § 47A.
- c) Counsel's motion, affidavit and memorandum should set forth relevant testimony or materials, or refer to the lack thereof, presented at the hearing. Because these motions are not de novo proceedings, relevant portions of the hearing should be appended. If new counsel is representing the youth he/she should confer with prior counsel who represented the client in the juvenile court and review the proceedings in detail. Counsel should ascertain whether there have been any significant personal or family changes arising since the conclusion of the juvenile court proceedings. Counsel should secure any further evaluations or other materials that are in the youth's best interest. New counsel should, as appropriate, confer with any representatives of state agencies or others involved with the youth.
- d) If the court denies the Motion to Dismiss and/or Remand, counsel should consider an appeal to the Supreme Judicial Court pursuant to G.L. c. 211, § 3 and relevant case law.

IV. YOUTHFUL OFFENDER PROSECUTIONS

J 4.1 Appointment of Counsel

Counsel should be aware of the criteria established by G.L. c. 119, §§ 52, 54, and 58, regarding which cases are eligible for Youthful Offender prosecution. Counsel should also be aware of all procedural differences between delinquency and youthful offender prosecutions. Only attorneys who have been certified for YO cases should accept a case in which YO prosecution is possible.

J 4.2 Limiting Consequences of Indictment

- a) Counsel should at the earliest opportunity make every effort to advise the client of the ramifications of a YO prosecution. Counsel should assess the strength of the Commonwealth's case as quickly as possible in order to assist the client in pre-indictment plea bargaining.
- b) Counsel should be prepared to develop dispositional material quickly, if it might be of assistance in persuading the Commonwealth not to pursue a Youthful Offender indictment. Counsel should be aware of the indictment policies of the County in which the case is pending and be prepared to initiate pre-indictment plea negotiations at the appropriate time in the appropriate cases.

- c) In the event of a Youthful Offender indictment, counsel should prepare the case for trial in the same manner that a case is prepared for trial in the Superior Court. Pretrial preparation includes discovery motions, investigation, substantive motions, client preparation, etc. See section V. Pretrial Preparation, below.

J 4.3 Youthful Offender Sentencing

- a) Simultaneous with the trial preparation, counsel should be preparing for a sentencing hearing. This process needs to begin prior to adjudication, because it is time-consuming to obtain records, background information, psychological evaluations, and the like. Counsel should remain on the lookout for information which might persuade the Commonwealth to agree to a dismissal or *nolle pros* of the indictment and reinstatement of the delinquency complaint.
- b) Counsel should be aware that G.L. c. 119, § 58, states that upon a defendant being adjudicated to be a Youthful Offender, the Court "shall conduct a sentencing recommendation hearing." This hearing is to "determine the sentence by which the present and long-term public safety would be best protected." Counsel should be ready to address the factors outlined in the statute as well as any other factors (helpful or otherwise) which the Court might or ought to consider. At all times counsel should keep in mind that tactical decisions regarding the sentencing process should be based on the client's stated goals.
- c) Counsel should take all necessary steps to prepare for the sentencing hearing. This may include: obtaining funds for an independent psychological evaluation, obtaining funds for a psycho-social evaluation by a LICSW or other qualified professional, sharing information with the probation office responsible for preparing a report for the Court, assisting with a court-ordered Court Clinic Evaluation, etc. This may also involve asking DYS to make a pre-adjudication classification decision.
- d) Counsel should be prepared to argue that the youthful offender provisions of G.L. c. 119 permit DYS commitments to be suspended, even for firearm offenses. Counsel should be aware that the mandatory commitment language in G.L. c. 119, § 58, for gun offenses is for delinquency adjudications; the statute is silent as to whether mandatory commitment also applies to youthful offender adjudications.
- e) Counsel should recognize that a juvenile disposition is almost, but not always, better than an adult disposition. Counsel should approach sentencing creatively and should advise clients about both short and long term consequences of sentencing, particularly when dealing with adult suspended sentences.
- f) Counsel should be aware that the court is required (G.L. c. 119, § 58) to make written findings stating its reasons for the sentence imposed. Counsel is well-advised to consider filing proposed findings.
- g) Counsel should be prepared to withdraw a defendant capped plea or seek a stay of sentence and/or file an appeal of the sentence if the findings are inadequate.

J 4.4 Youthful Offender Indictment

- a) Counsel should be aware of the three factors G.L. c. 119, § 54, requires for a youthful offender indictment.
- b) Counsel should thoroughly review the grand jury minutes to evaluate whether the prosecution presented sufficient evidence to satisfy the requirements of § 54.
- c) Counsel should be aware of the current case law regarding motions to dismiss youthful offender indictments. Commonwealth v. Quincy Q., 434 Mass. 859 (2001).
- d) Counsel should also be aware that the three factors required in section 54 must be proved beyond a reasonable doubt at trial.

V. PRETRIAL PREPARATION

J 5.1 Investigation

Counsel should promptly investigate the circumstances of the case and explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities as well as from witnesses identified by the client or by others. Counsel should consider obtaining funds for an investigator to interview witnesses, while being aware of his/her reciprocal discovery obligations. Counsel should go to the scene of the alleged crime in a timely manner, prior to the pre-trial hearing when necessary, or prior to an evidentiary hearing or trial. Counsel should consider obtaining fair and accurate photographs, fair and accurate maps of the area and, where relevant, measurements.

J 5.2 Probation Surrender Hearings

- a) Counsel appointed to represent a client charged with violation of his/her probation should prepare in the same way and with as much care as for a trial. Counsel must request time to: (i) conduct an in-person interview with the probationer; (ii) discover and review the Probation Department file; (iii) discover and review records of the probationer's participation in mandated programs; (iv) obtain expert assistance to test the validity of scientific evidence underlying the surrender (e.g., urinalysis results); and (v) identify, locate, and interview exculpatory or mitigating witnesses, etc. Counsel should consider selecting a date for the final hearing that allows the client sufficient time to work towards compliance with the conditions of probation.
- b) Counsel shall be familiar with the District Court Rules for Probation Violation Proceedings. See G.L. c. 218, § 59.
- c) Per District Court Rules for Probation Violation Proceedings, most judges will not allow the violation of probation hearing to track a new offense. Therefore, counsel must prepare for the final hearing based upon the facts of the new offense and familiarize him/herself with the case law regarding admissibility and sufficiency of hearsay in these proceedings. If counsel does not represent the client on the new offense, counsel should contact the attorney who does represent the client on the new offense to discuss the hearing, possible discovery issues, possible defenses and possible consequences of a finding of a violation of probation.

J 5.3 Pre-Trial Motions and Affidavits

Counsel should file any motions that are strategically and legally appropriate. The decision to file motions should be made only after appropriate investigation (including client interview, examination of court documents and other material obtainable through informal means and summons) and researching relevant law. Counsel must be familiar with the requirements of the Massachusetts Rules of Criminal Procedure, including time limits and affidavit requirements. If more time is needed, it should be requested. Before filing a pretrial motion and affidavit, counsel should be aware of any adverse potential effects, such as its impact on the defendant's speedy trial rights or the opportunity a motion may provide the Commonwealth to preview and strengthen a weak case. Counsel should also be aware of the adverse consequences that may attend the failure to file motions, such as "waiver" of rights or defenses. Affidavits should be drafted with care to protect the client's Fifth Amendment rights and to avoid disclosing trial strategy.

J 5.4 Pre-Trial Conference Reports

If a pretrial hearing is ordered, counsel should be cognizant of the requirements of Mass. R. Crim. P. 11. Counsel should carefully scrutinize and amend any pretrial conference forms to comport with fairness and case law and to protect the client's best interests. Counsel should amend pretrial conference report forms to accurately reflect counsel's reciprocal discovery obligations pursuant to Mass. R. Crim. P. 14 (a)(3) and relevant case law.

J 5.5 Discovery Motions

Among the discovery material counsel should consider seeking, through motions if necessary, are the following items that may be in the custody or under the control of law enforcement or other prosecution agents or agencies:

1. details of all identification procedures, including examination of any photographs shown and selected;
2. written and oral statements of defendant/co-defendant(s);
3. copies of statements by potential witnesses;
4. copies of all official reports, e.g., police, arson, hospital, results of any scientific test;
5. inspection of physical evidence;
6. list of potential witnesses and addresses;
7. names and addresses of any witnesses, including proposed police officer experts, expected to offer expert opinions and the substance of their anticipated testimony (including their curriculum vitae/resume, materials used or relied upon in reaching their opinion and the factual and scientific basis for their opinion);
8. probation records of all potential witnesses;
9. copies of Grand Jury minutes;
10. exculpatory evidence, identified as specifically as possible, and including promises, rewards, and inducements made to witnesses;
11. any other items that would be helpful in preparing and trying the case (e.g., audio or videotapes of interviews, booking, scenes, etc.);
12. notice of prior or subsequent bad act evidence; and
13. notice of excited utterance evidence.

J 5.6 Reciprocal Discovery

Counsel must be familiar with the rules and developing body of case law regarding reciprocal discovery. Counsel must be aware of, consider, and thoroughly research any potential obligations and time limits regarding reciprocal discovery (Mass. R. Crim. P. 14[a][3]).

J 5.7 Substantive Pretrial Motions

Among the motions that counsel should consider are:

1. nonsuggestive identification procedures (e.g., lineup or its equivalent, testimony with client out of view, etc.) where strategically indicated and desired by the client;
2. dismissal for unconstitutionality of the statute;
3. dismissal for insufficiency of the complaint or indictment;

4. dismissal for insufficiency of the evidence presented to the grand jury/magistrate resulting in indictment/complaint, including insufficiencies under Commonwealth v. Quincy Q., 434 Mass 859 (2001); or for impairment of the integrity of the grand jury;
5. request for speedy trial or dismissal for lack of speedy trial either for violation of Rule 36 or on constitutional grounds;
6. severance or joinder of defendants or charges;
7. suppression of evidence obtained in violation of federal and Massachusetts law, i.e., (i) illegally seized evidence, (ii) "un-Mirandized" or involuntary statements, (iii) statements made where an "interested adult" was not present or did not adequately advise the juvenile, (iv) identifications procured by impermissibly suggestive procedures. Counsel should take care to consider issues which may be unique to juvenile defendants such as the "interested adult rule" and school search scenarios;
8. funds for experts, investigators, interpreters, etc., under G.L. c. 261, §§ 27A -27D. Counsel should consider retaining experts as consultants to aid in trial preparation, not only as witnesses. Counsel should be aware of the procedures for appealing the denial of a motion for funds;
9. Counsel should pay particular attention to any competency issues and file motions for funds accordingly;
10. Counsel should also consider motion for funds for social workers and/or psychologists to aid in the preparation and disposition of the case; and
11. Any other issues that are appropriate.

J 5.8 Trial Motions

Counsel should be aware that certain motions are generally reserved for the trial judge, e.g., motions *in limine* and motions to sequester.

J 5.9 Motion Hearings

When a dispute on a motion requires a hearing, counsel's preparation should include:

1. investigation and discovery necessary to advance the claim, including visits to any scenes relevant to the subject matter of the motion;
2. careful research of appropriate case law which supports or expands rights guaranteed by the federal and state constitutions and/or the Massachusetts Rules of Criminal Procedure;
3. subpoenas for pertinent evidence and witnesses;
4. full understanding of the burdens of proof and evidentiary rules;
5. careful consideration of the benefits/costs of having the client testify;
6. careful preparation of any witnesses who are called, especially the defendant;
7. submission of a memorandum of law. (In some cases, a memorandum is required; in most cases it is advisable.) Proposed findings of fact and law are often advisable, as well.

J 5.10 Discovery Compliance

Once counsel's discovery motions are allowed, if appropriate, counsel should seek prompt compliance and/or sanctions for failure to comply. G.L. c. 119, § 55A, provides that Commonwealth's discovery responses be in writing upon motion of the juvenile or the court's own motion.

J 5.11 Interlocutory Relief

Where appropriate, counsel should consider seeking interlocutory relief, under the applicable Rule or statute, after an adverse pretrial ruling. The conduct of interlocutory hearings, including the submission of briefs and oral argument, is ordinarily the responsibility of trial counsel, whether the hearing was initiated by counsel or by the prosecution. Trial counsel handling an interlocutory appeal should contact the CPCS Director of Criminal Appeals-Private Counsel Division to determine whether assistance by appellate counsel is warranted.

J 5.12 Sentencing

Counsel should begin gathering information relative to possible sentencing as soon as possible. This should include, but not be limited to, obtaining any and all relevant school records, background information, psychological evaluations, and the like. See § J 4.3, ¶¶ a – g, and § J 8.1, ¶¶ 1 – 15.

VI. DISPOSITIONS BY PLEA OR ADMISSION

J 6.1 Plea Negotiations

- a) After interviewing the client and developing a thorough knowledge of the law and facts of the case, the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts.
- b) Counsel should inform the client of any plea negotiations before they occur unless it is impractical to do so, in which case counsel should inform the client of the negotiations as soon after they occur as is possible.
- c) Counsel is responsible for fully explaining to the juvenile the concept of plea bargaining in general, as well as the details of any specific plea offer made to him/her. Counsel must use language appropriate to the client's age and mental capabilities.
- d) The attorney shall make it clear to the client that the ultimate decision to offer a change of plea or admit to sufficient facts has to be made by the client. Counsel should investigate and candidly explain to the client the prospective strengths and weaknesses of the case for the prosecution and defense, including the availability of prosecution witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of a conviction after trial. Counsel's recommendation on the advisability of a plea or admission should be based on a review of the complete circumstances of the case and the client's situation. Such advice should not be based solely on the client's acknowledgement of guilt or solely on a favorable disposition offer.
- e) Where negotiations are begun, counsel should attempt to obtain the most favorable disposition possible for the client. The client shall be kept informed of the status of the plea negotiations.

J 6.2 Client Decisions

- a) Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change his/her position. If the client remains unpersuaded, however, the attorney should assure the client he/she will defend the client vigorously.
- b) Counsel must not attempt to unduly influence or coerce the accused into pleading guilty or admitting to sufficient facts by any means, including, but not limited to, overstating the likelihood of conviction or potential consequences, or by threatening to withdraw from representing the accused if he/she decides not to

accept the proposed agreement and to proceed to trial. It may be appropriate in rare cases to write a letter to the client outlining counsel's advice and the basis therefore.

- c) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case in the same manner as if it were going to proceed to trial on the merits.

J 6.3 Preparation

- a) When a client decides to offer a change of plea, or admit to sufficient facts, counsel must fully explain to the client all aspects of the plea agreement, if any, including sentencing recommendations, using language appropriate to the client's age and mental capabilities. Counsel must carefully prepare the client to participate in the procedures required under Mass. R. Crim. P. 12 and used in the particular court. Counsel shall also ascertain and advise the client of the court's practices concerning sentence recommendations and withdrawing pleas or admissions.
- b) In advising a juvenile defendant regarding the consequences of a plea agreement, counsel must fully explain to the client, using language appropriate to the client's age and mental capabilities, DYS placement policies including: the classification grid, "staffing", classification, secure treatment, residential treatment, tracking, Grant of Conditional Liberty (GCL), and revocation of GCL.
- c) Before advising the prosecution and court that the client is willing to offer a change of plea or an admission to sufficient facts, counsel must also be satisfied that the plea is voluntary, that the client understands the nature of the charges, that there is a factual basis for the plea or the admission, that the witnesses are or will be available, and that the client understands the rights being waived including: a trial with or without a jury where the Commonwealth has the burden of proving guilt beyond a reasonable doubt, the right to confront witnesses, and the privilege against self-incrimination.
- d) Counsel should negotiate the statement of facts with the prosecutor, advocating for language most favorable to the client. Counsel must also fully review the statement of facts with the client, and prepare him/her for the specific language to be used in court.

J 6.4 Consequences of Conviction

Counsel must also fully advise the client of the consequences of a conviction, including:

1. the maximum possible sentence of all offenses;
2. mandatory minimum sentences where applicable;
3. effects of adult sentences on juvenile defendants;
4. different or additional punishments where applicable, such as for second offenses, probation violation or parole revocation consequences;
5. potential liability for enhanced punishment after subsequent arrest, i.e., adult habitual offender, armed career criminal, second and subsequent offenses;
6. possible Federal charges or penalty enhancements;
7. conviction consequences for non-citizens (G.L. c. 278, § 29D);
8. Sex Offender Registration Act (G.L. c. 6, §§ 178C, et seq.) and DNA Seizure and Dissemination Act (G.L. c. 22E) requirements. As to the Sex Offender Registry Act, counsel should be aware that if delinquency or

youthful offender adjudication does not result in confinement, under G.L. c. 6, § 178E, paragraphs e-f, you are entitled to a judicial determination that the juvenile does not pose a risk of re-offending and therefore is relieved from registering. Upon written motion by the Commonwealth, a judge may relieve a juvenile from registering, even if sentenced to confinement;

9. parole eligibility (including the discretionary nature of parole decisions and that being eligible for parole does not confer a right to parole);
10. potential civil liabilities;
11. potential housing consequences for the defendant and his/her family;
12. potential loss or suspension of driving license;
13. potential school suspension or expulsion consequences (G.L. c. 71, §§ 37H and 37H1/2);
14. potential eligibility for youthful offender indictment in future cases;
15. potential risk of the Commonwealth seeking civil detention pursuant to the SDP (sexually dangerous persons) law (G.L. c. 123A);
16. potential risk of life time community parole;
17. potential adverse consequences on the client's employment or education; and
18. possible immigration consequences including but not limited to deportation, denial of naturalization or refusal of reentry into the United States.

J 6.5 Necessity of Admission of Guilt

Where the proceeding is a final adjudication, counsel should not advise the client to plead guilty unless the client either admits guilt to counsel, admits guilt to the court in a colloquy, only admits to sufficient facts, or tenders an Alford plea. During and after the change of plea colloquy, counsel must vigorously enforce all aspects of a plea agreement. Where a change of plea is contingent upon a specific agreement, counsel must be sure that the court is so informed before the tender of the plea, and that the agreement is duly recorded.

J 6.6 Disposition Argument

Notwithstanding a disposition by plea or an admission to sufficient facts, counsel must be prepared for sentencing arguments, including, where appropriate, argument for release pending sentencing or appeal.

VII. TRIAL PROCEEDINGS

J 7.1 General Trial Preparation

- a) Counsel should consider all steps necessary to complete investigation, discovery, and research in advance of trial, such that counsel is confident that the most viable defense theory has been fully developed, pursued, and refined. This preparation should include consideration of:
 1. summoning all potentially helpful witnesses, utilizing *ex parte* procedures if advisable (Mass. R. Crim. P. 17);
 2. summoning all potentially helpful physical or documentary evidence;

3. arranging for defense experts to consult and/or testify on any evidentiary issues that are potentially helpful; e.g., testing of physical evidence, opinion testimony, etc.;
 4. obtaining and reading transcripts and other records of prior proceedings in the case or related proceedings;
 5. obtaining photographs or preparing charts, maps, diagrams or other visual aids of all scenes, persons, objects, or information which may aid the fact finder in understanding the defense case and preparing to secure the admission of such evidence through witnesses who will testify at trial.
- b) Where appropriate, counsel should have the following materials organized and accessible at the time of trial:
1. copies of all relevant documents in the case;
 2. relevant documents prepared by investigators;
 3. proposed *voir dire* questions;
 4. motions *in limine*;
 5. outline of opening statement;
 6. cross-examination plans for all possible prosecution witnesses;
 7. motion for required finding of not guilty, renewed motion for required finding of not guilty, and outline of argument for required findings of not guilty and authorities supporting it;
 8. direct examination plans for all prospective defense witnesses;
 9. copies of defense subpoenas;
 10. prior statements of all prosecution witnesses (e.g., Grand Jury minutes transcripts, police reports);
 11. prior statements of all defense witnesses;
 12. reports from defense experts;
 13. a list of all defense exhibits, and the witnesses through whom each will be introduced;
 14. proposed jury instructions with supporting case citations;
 15. copies of all relevant statutes and cases, including statutes and cases relating to any potential lesser-included offenses; and
 16. outline or draft of closing argument.
- c) Counsel should be fully informed of the rules of evidence, and the law relating to all stages of the trial process, and should prepare for all legal and evidentiary issues that can be anticipated in the trial.
- d) If it is beneficial, counsel should seek an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant, prior or subsequent bad acts, reputation testimony, excited utterances, prejudicial evidence) and, where appropriate, counsel should prepare motions *in limine* and memoranda for such advance rulings.

- e) Counsel should be alert to and understand the importance of establishing, for appellate purposes, a complete record of the trial proceedings, and to be fully informed of the applicable law and practice regarding:
 - 1. preservation of each type of objection at every stage of the proceedings;
 - 2. offers of proof regarding evidence ruled inadmissible;
 - 3. recording of trial proceedings. Counsel should be aware that tape recordings of district court proceedings often prove to be inaudible or unreliable. Accordingly, counsel should make every attempt to obtain a stenographer, rather than rely only on a tape recording. G.L. c. 261, § 27(c); G.L. c. 218, § 27A.

J 7.2 Sequestration

Unless tactically inadvisable, counsel shall seek sequestration of all witnesses (including police, if possible) for trial (Mass. R. Crim. P. 21).

J 7.3 Bench Trial or Jury Trial

- a) The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel. See Section V., Dispositions by Plea or Admission; Section I., General Principles of Representation.
- b) Counsel should fully advise the client of the advantages and disadvantages of either a jury or jury-waived trial. Counsel should be knowledgeable about and advise the client of the practices of the judge before whom the case may be tried. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely responses to cross-examination.

J 7.4 Voir Dire and Jury Selection

a) Preparation

- 1. Counsel should be familiar with the law governing the selection of the jury venire. Counsel should also be alert to any potential legal challenges to the composition or selection of the venire.
- 2. Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury, including Superior Court Rule 6, and should be alert to any potential legal challenges to those procedures.
- 3. Prior to jury selection, counsel should seek access to the juror questionnaires that have been completed by potential jurors.
- 4. Counsel should develop and file in advance of trial written *voir dire* questions tailored to the particular case.
- 5. Counsel should be familiar with the law concerning *voir dire* inquiries so as to be able to defend any request for particular questions.
- 6. Counsel should consider asking for extra peremptory challenges.
- 7. Counsel should consider requesting appropriate *voir dire* questions regarding the prospective jurors' attitude regarding the juvenile's age and credibility, as well as attitudes toward juvenile crime and whether the Juvenile Court is lenient with juvenile cases.

8. Counsel should be familiar with varied practices in this area (e.g., use of juror questionnaires and attorney-conducted *voir dire*) and should attempt to employ these where appropriate.

b) Examining the Prospective Jurors

1. Counsel should be familiar with case law that requires individual *voir dire* in certain cases, e.g., inter-racial murder or other inter-racial cases, or sexual assault cases, sexual assault on children, "insanity" defenses.
2. Where appropriate, counsel should consider seeking permission to personally *voir dire* the panel, or at the very minimum, if the court poses questions, to ask follow-up questions.
3. When appropriate, counsel should consider requesting individual juror *voir dire* even when case law does not require it, particularly if the proposed *voir dire* questions may elicit sensitive information or expose prejudices. Counsel should be familiar with case law supporting such requests.
4. Counsel should be familiar with case law regarding the client's right to be present during individual *voir dire*. Counsel should fully discuss the risks and benefits of asserting this right with the client.

c) Challenges

1. Counsel should challenge for cause all persons about whom a legitimate argument can be made for prejudice or bias.
2. When challenges for cause are not granted, counsel should consider exercising peremptory challenges to eliminate such jurors, and where appropriate, ask for additional challenges.
3. In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
4. Counsel should make every effort to consult with the client in exercising challenges.
5. Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.
6. Counsel should be aware that the number of challenges in a juvenile case is governed by Mass.R.Crim.P. 20(c)(1) and G.L. c. 119, § 56(e).

J 7.5 Opening Statement

- a) Counsel should consider the strategic advantages and disadvantages of making an opening statement, of disclosing particular information during the opening, and of deferring the opening statement until the beginning of the defense case. Except in extraordinary circumstances, counsel should make an opening statement.
- b) Counsel should be familiar with the law governing opening statements, particularly in a case where counsel does not plan to present any affirmative evidence. In addition, counsel should attempt to be familiar with individual trial judges' practices regarding the permissible content of opening statements.
- c) Counsel's objectives in making an opening statement may include the following:
 1. to provide an overview of the theory of the defense case;
 2. to summarize the testimony of witnesses and the role of each in relationship to the entire case;

3. to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
 4. to identify the weaknesses of the prosecution's case;
 5. to remind the jury of the prosecution's burden of proof;
 6. to clarify the jurors' responsibilities; and
 7. to personalize/humanize the client and counsel to the jury.
- d) Counsel should consider incorporating in the defense summation the promises of proof the prosecutor makes to the jury during his/her opening statement.
 - e) Counsel should be prepared to object to the prosecutor's opening statement if it is improper and to seek curative instructions or a mistrial.
 - f) Counsel should record, and consider incorporating in the defense summation, promises of proof the prosecutor makes to the jury during his/her opening statement.

J 7.6 Confronting the Prosecution's Case

- a) Counsel should research and be fully familiar with all of the elements of each charged offense and should anticipate weaknesses in the prosecution's case.
- b) Counsel should systematically analyze all potential prosecution evidence, including physical evidence, for evidentiary problems.
- c) In preparing for cross-examination, counsel should make an effort to be familiar with the applicable law, procedures and techniques concerning cross-examination and impeachment of witnesses.
- d) In preparing for and carrying out cross-examination, counsel should also:
 1. develop a coherent and sensible theory of the case, along with the framework of the closing argument;
 2. anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;
 3. integrate cross-examination, the theory of the defense and closing argument;
 4. consider whether cross-examination of each witness is necessary or likely to generate helpful information;
 5. review and organize all prior statements and testimony of each witness;
 6. be alert to inconsistencies and variations within each witness's testimony or contradictions (including material omissions) in prior statements by the witness;
 7. be alert to significant omissions or deficiencies in the testimony of any witness, e.g., investigative steps not taken, persons not interviewed by the police, failure to mention obvious physical characteristics;
 8. consider using certified copies of prior convictions or pending cases of witnesses, keeping in mind that juvenile adjudications may be used in the same manner as adult convictions;
 9. be alert to all issues relating to witness competency or credibility, including bias or motive for testifying;

10. be alert to potential 5th Amendment issues that apply to any witness;

11. elicit all facts to build and support the theory of defense.

- e) If counsel is surprised by any statements or items which should have been provided in discovery, but were not, counsel should request adequate time to review these before commencing cross-examination and should consider seeking any possible sanctions.
- f) Counsel should carefully consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case.
- g) Unless it is clearly frivolous, counsel should file a motion and move at the close of the prosecution's case and out of the presence of any jury for a required finding of not guilty on all charges and/or any aggravating element, where appropriate. For cases that have strong legal issues to support counsel's argument, counsel should research the applicable case law and prepare, in advance, a memorandum in support of his/her motion. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

J 7.7 Presenting the Defense Case

- a) Counsel should develop, in consultation with the client, a sensible overall defense strategy. Counsel should consider and advise the client whether the client's interests are best served by not offering testimony or evidence, but by relying on the prosecution's failure to meet its burden of proof instead.
- b) Counsel should discuss with the client all of the considerations relevant to the client's decision whether to testify (including the likely areas of cross-examination and impeachment).
- c) Counsel should understand both the elements and tactical considerations of any affirmative defense, and should know whether the client bears a burden of persuasion or a burden of production.
- d) In preparing for presentation of a defense case, counsel should, where appropriate:
 - 1. consider all potential evidence which could corroborate the defense case, and the import of any evidence which is missing;
 - 2. after discussion with the client, make the decision whether to call any witnesses;
 - 3. develop a plan for direct examination of each potential defense witness;
 - 4. determine the implications that the order of witnesses may have on the defense case;
 - 5. consider the possible use and careful preparation of character witnesses, along with the risks of rebuttal and wide-ranging cross-examination;
 - 6. consider the need for expert witnesses, especially to rebut any expert opinions offered by the prosecution;
 - 7. consider the use of physical or demonstrative evidence and the witnesses necessary to admit it; and
 - 8. obtain the prior records of all defense witnesses.
- e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

- f) Counsel should prepare all witnesses for all foreseeable direct and cross-examination. Counsel should also advise witnesses of suitable courtroom dress, demeanor and procedures, including sequestration.
- g) Counsel should systematically analyze all potential defense evidence for evidentiary problems. Counsel should research the law and prepare legal arguments in support of the admission of each piece of testimony or other evidence.
- h) Counsel should conduct a direct examination that follows the rules of evidence, effectively presents the defense theory, and anticipates/defuses potential weak points.
- i) If an objection is sustained, counsel should make appropriate efforts to re-phrase the question(s) and/or make an offer of proof.
- j) Counsel should guard against improper cross-examination by the prosecutor.
- k) Counsel should conduct re-direct examination as appropriate.
- l) At the close of the defense case, counsel should renew any previously filed motions for a required finding of not guilty on each charged count and/or aggravating element.
- m) Counsel should keep a record of all exhibits identified or admitted.

J 7.8 Closing Argument

- a) Before argument, counsel must file and should seek to obtain rulings on all requests for instructions (see Mass. R. Crim. P. 24(b) and 26) in order to tailor or restrict the argument properly in compliance with the Court's rulings.
- b) Counsel should be familiar with the law and the individual judge's practice concerning time limits, objections and substance of closing arguments.
- c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used and persuasively argued in pursuit of the defense theory of the case. Counsel should consider:
 - 1. highlighting weaknesses in the prosecution's case, including what potential corroborative evidence is missing, especially in light of the prosecution's burden of proof;
 - 2. favorable inferences to be drawn from the evidence;
 - 3. incorporating into the argument:
 - (a) helpful testimony from direct and cross-examinations;
 - (b) verbatim instructions drawn from the expected jury charge; and
 - (c) responses to anticipated prosecution arguments.
 - 4. the effects of the defense argument on the prosecutor's possible rebuttal argument.
- d) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting (either immediately or at conclusion of argument), requesting a mistrial, or seeking cautionary instructions. Counsel should weigh strategic considerations in deciding whether to object during or after the prosecutor's closing argument.

- e) Counsel should avoid a closing which restates the Commonwealth's case. Counsel should consider incorporating in his/her summation the promises of proof the prosecutor made to the jury during his/her opening.

J 7.9 Jury Instructions

- a) Counsel must file proposed or requested jury instructions before closing argument.
- b) Counsel should be familiar with the law and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
- c) Counsel should submit both standard and modified jury instructions tailored to the particular circumstances of the case and should provide case law in support of the proposed instructions.
- d) Where appropriate, counsel should object and argue against instructions proposed by the prosecution.
- e) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of the proposed instructions or reading the proposed instructions into the record.
- f) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions. After the charge, counsel should object on a timely basis to deviations and any other instructions unfavorable to the client, and, if necessary, request additional or curative instructions.
- g) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge give counsel a meaningful opportunity to be heard (outside the jury's presence) on the supplemental instruction before it is delivered.

J 7.10 Taking Verdicts

Counsel should be alert to any improprieties in the verdict and consider requesting that the jury be polled.

VIII. SENTENCING

J 8.1 Preparation

Defense counsel should be familiar with and consider:

1. the statutory penalties for each possible adjudication/conviction of the client, including each lesser-included offense and any repeat offender penalties. In particular counsel should be familiar with the sentencing provisions of G.L. c. 119 which distinguish between delinquency, youthful offender, and criminal adjudications;
2. the official version of the client's prior record, if any;
3. the position of the probation department with respect to the client;
4. the sentencing recommendation and memorandum, if any, of the prosecutor;
5. seeking the assistance of an expert -- either through community resources, G.L. c. 261, §§ 27A-G, or the Committee for Public Counsel Services;

6. the collateral consequences attaching to any possible sentence, e.g., parole or probation revocation, immigration consequences, later exposure to prosecution as a repeat offender, possibility of sexually dangerous person proceedings, loss of license, Sex Offender Registration, DNA Seizure and Dissemination, school suspension or expulsion, expulsion from public housing, lifetime community parole, or civil forfeiture of property;
7. the sentencing practices of the judge, to the extent they may be determined;
8. the sentencing guidelines, as they would apply to the case;
9. referrals to court clinics or other community agencies, and the possibility of commitment to a mental hospital for an evaluation in aid to sentencing under G.L. c. 123, § 15(e);
10. any victim impact statement to be presented to the court;
11. any other report to be presented to the court in aid of sentencing;
12. seeking an evidentiary hearing; e.g., restitution amount;
13. requesting a continuance for sentencing at a later date;
14. any other information or proposals that may be helpful to the client; and
15. the DYS classification grid.

J 8.2 Prosecution and Probation Recommendations

Counsel should advocate in advance of trial or sentencing for a favorable recommendation from both the prosecutor and the representative of the probation department.

J 8.3 Pre-Sentence Reports

- a) Counsel should be familiar with the practices of the court and its probation department relative to pre-sentencing reports. Counsel should consider requesting one where, after consultation with the client, s/he has good reason to believe that it would be helpful.
- b) Counsel shall determine the accuracy and completeness of all sentencing reports and statements and should be prepared to challenge any incorrect information or omissions and take steps to correct inaccuracies before prejudice occurs.
- c) Counsel should carefully prepare the client for, and attempt to attend, any pre-sentence interview to be conducted in aid of sentencing. Counsel should advise about the client's Fifth Amendment rights, if appropriate.
- d) Counsel should be aware that any juvenile sentenced as a youthful offender is entitled to have a pre-sentence investigation and report.

J 8.4 Defense Recommendations

- a) Counsel should carefully consider and discuss with the client any sentencing recommendations to be made by the defense and the reasons for them. If appropriate, counsel should discuss any recommendations with other experienced defense counsel. Counsel should explore all reasonable alternatives to commitment to DYS or incarceration as an adult, e.g., community services, educational services, rehabilitative programs, DSS

services, including shelter care, foster placement, or residential placement, DMH or DMR services, outpatient counseling, inpatient drug treatment, and restitution.

- b) Where tactically advisable or requested by the court, counsel should prepare a sentencing memorandum, presenting every factual and legal ground that will assist in reaching the most favorable disposition obtainable.
- c) At sentencing, counsel should zealously advocate the best possible disposition, including a request for continuance without a finding, especially if the client has no record. Note that G.L. c. 119, § 58 permits a CWOFF even after trial for most charges. Counsel should take whatever steps are necessary, including, where appropriate, the presentation of documentary evidence and witnesses, e.g., reports or testimony from employers, community representatives, therapists/counselors, and family.
- d) Where appropriate, counsel should carefully prepare the client or a close relative to address the court.

J 8.5 Dispositions

- a) Counsel should be alert to, and challenge by hearing if necessary, any inappropriate conditions of probation, including the amount of restitution.
- b) Counsel should request a reasonable time period for the payment of any fines or restitution. If appropriate, counsel should request that a hearing be held to determine the amount of restitution and should represent the client at that hearing.
- c) Counsel should fully explain to the client, using language appropriate to the client's age and mental capabilities, the foreseeable consequences of the sentence, including any conditions of probation and the consequences of violating probation.
- d) Counsel should fully explain to the client, using language appropriate to the client's age and mental capabilities, the DYS Classification Grid, as well as the possibility of extension of DYS commitment (G.L. c. 120, §§ 17-20). (Unless inappropriate, counsel should also advise the parent of these factors.)
- e) Counsel should insure that the sentence accurately reflects the rights of the client for parole eligibility and jail credit.
- f) Counsel should consider requesting specific orders or recommendations from the court, including, but not limited to, the place or conditions of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, and recommendations against deportation.
- g) If a DYS commitment results at disposition, it is highly recommended that counsel attend the case conference (also known as "staffing") which takes place after an initial evaluation period of approximately three weeks. When attendance is not feasible, the attorney may call or write the assigned caseworker with recommendations.
- h) Counsel should be familiar with the statutes and case law concerning jail credit. Counsel should ensure that the mittimus accurately reflects any jail credit to which the client is legally entitled. Trial counsel should be available to correct an error in the mittimus discovered at a later date.

IX. POST-TRIAL PROCEEDINGS

(See CPCS Standards for Appellate Representation.)

J 9.1 Appellate Rights

- a) Counsel should advise the client after sentencing about the right to file a motion to revise and revoke the sentence. Counsel should explain the value of filing the motion to enable the court to fashion an equitable disposition in future proceedings. Counsel should file such motion in a timely fashion, pursuant to Mass. R. Crim. P. 29, if requested to do so by the client or, if appropriate to protect the client's interests.
- b) After advising the client of the right to appeal, trial counsel should implement the client's decision in that regard. If an appeal is taken, trial counsel should timely file the appropriate notice of appeal and request either a tape or transcript of the prior court proceeding.
- c) Where there is an appeal, counsel should consider requesting a stay of execution of any sentence, particularly one of incarceration. If the stay is denied, counsel should consider appealing the denial of the stay to a single justice of either the Appeals Court or the Supreme Judicial Court.
- d) If a state prison sentence has been imposed, counsel should consider filing a sentencing appeal. Counsel should represent the client at the sentencing appeal.

J 9.2 Continuing Duty to Represent

- a) Trial counsel should file a Motion to Withdraw and a Motion for Appointment of Substitute Counsel on Appeal so that appellate counsel will be appointed. Trial counsel should assure that these motions are acted upon by the court.
- b) Counsel retains responsibility for the case until and unless another attorney assumes that responsibility. Trial counsel should fully cooperate with successor counsel including prompt provision of the trial file that includes all work product. Upon request of the client, trial counsel will provide a copy of said trial file.

3. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CLIENTS ON CRIMINAL APPEALS AND POST-CONVICTION MATTERS

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

1. The role of appellate defense counsel is to diligently and zealously seek to obtain redress of the convicted client's rights and interests through the appellate process on all matters within the scope of counsel's assignment. It is counsel's duty to give the client counsel's undivided loyalty free of any conflicts of interest, and to maintain the confidentiality of all client communications. Counsel's commitment to these duties and obligations must remain unaffected by the client's indigent status, the client's background, or the nature of the case. All clients deserve and must be afforded the same undivided loyalty, confidentiality, competent representation, and zealous advocacy.
2. Immediately upon receipt of the assignment of a direct appeal or new trial motion, the appellate defender shall: (a) file an appearance in the appropriate court, (b) communicate with the client to inform the client of the assignment, and (c) determine that the necessary transcripts and tapes have been ordered. Immediately upon receipt of the assignment of a screening concerning a motion to withdraw guilty plea, the appellate defender shall communicate with the client to inform the client of the assignment, but should only file an appearance after the appellate defender has conducted a review and determined that there is a meritorious basis for the motion.

Upon receipt of the assignment of a screening other than a motion to withdraw guilty plea, the appellate defender may, but is not required to, contact the defendant. The appellate defender in a screening assignment other than a motion to withdraw guilty plea should file an appearance in court only after assignment of counsel has been approved by the Director of Criminal Appeals, Private Counsel Division, as the Chief Counsel's designee.

3. The appellate defender shall keep the client informed of all significant developments in the client's case. The appellate defender shall respond in a timely manner to all correspondence of a reasonable volume and frequency. The appellate defender shall accept collect telephone calls from an incarcerated client of a reasonable number and frequency.
4. Within three weeks after the receipt of the transcript, the appellate defender shall have read the entire transcript of the case. If the appellate defender is still subject to CPCS' mentor requirements, as determined by the Director of Criminal Appeals, Private Counsel Division, the appellate defender shall immediately provide the mentor with a copy of the transcript and shall confer with the mentor as to the issues to be raised in the appeal. Whether or not still subject to mentor requirements, the appellate defender may also confer at any time with the Director or the staff attorneys of the Criminal Appeals Unit of the Private Counsel Division.
5. After reading the transcript, the appellate defender shall visit the client at the institution at which the client is incarcerated, or, if the client is not incarcerated, shall invite the client to visit the appellate defender at the appellate defender's office, for the purpose of conferring with the client about the issues that may be raised on the client's appeal.
6. If specifically requested by the client, the appellate defender must provide the client with a copy of the transcript and other trial-related materials and/or a copy of a draft of the brief.
7. If, after the conference described in Standard 5, the client insists on having briefed a contention that, in the judgment of the appellate defender, cannot be supported by any rational argument, the appellate defender (a) shall inform the client of the client's right with respect to such contention pursuant to Commonwealth v. Moffett, 383 Mass. 201, 203-209 (1981); and (b) shall supply the client with a copy of the Moffett opinion. If the client thereafter wishes to invoke his or her Moffett rights with respect to such contention, the appellate defender shall comply in all respects with the guidelines of the Moffett case set forth id. at 208-209 & n. 3.
8. If it appears to the appellate defender that, in light of the standards set forth in Commonwealth v. Hodge (No. 1), 380 Mass. 851, 855 (1980), there is a reasonable possibility that an incarcerated client might receive a stay of sentence pursuant to Rule 31 of the Massachusetts Rules of Criminal Procedure or Rule 6 of the Massachusetts Rules of Appellate Procedure, the appellate defender shall bring in the appropriate court a motion to stay the client's sentence.

9. The appellate defender must be familiar with and must comply with all court rules and standing orders, including the Massachusetts Rules of Criminal Procedure and Appellate Procedure, as well as the Rules and Standing Orders of the Supreme Judicial Court and the Appeals Court, and particularly with Appeals Court Standing Order 17A.
10. The appellate defender shall timely file in the appropriate court all motions necessary or advisable to preserve and perfect the client's appellate rights, including, where necessary, motions pursuant to Rule 14(b) of the Massachusetts Rules of Appellate Procedure to enlarge the time for filing the brief on behalf of the client, and motions pursuant to Rule 8 of the Massachusetts Rules of Appellate Procedure to correct or expand the record.
11. The appellate defender shall take the measures necessary to cure unreasonable delay in the production and assembly of the record on appeal, particularly the production of transcripts and tapes of the trial court proceedings. Such measures include contacting the court clerk, court reporter, or court administration and, if necessary, seeking a court order to cure unreasonable delay.
12. The appellate defender shall not file or litigate a motion for new trial (Mass. R. Crim. Pro. 30) or any other collateral attack on the defendant's conviction without first having obtained the approval of the Director of Criminal Appeals, Private Counsel Division.
13. The brief filed by the appellate defender on behalf of the client shall conform in all respects with Rules 16, 18, and 20 of the Massachusetts Rules of Appellate Procedure and shall be of high quality.
14. In any case in which the defendant faces lengthy incarceration, probation, or parole, the appellate defender shall consider whether there are federal constitutional claims which, in the event that relief is denied in the state appellate courts, could form the basis for a successful petition for a writ of habeas corpus in federal district court. If so, the appellate defender should raise and argue such federal constitutional claims, unless the appellate defender concludes that there is a tactical basis for not including such claims and the client assents.
15. The appellate defender shall transmit to the client a copy of the brief filed on the client's behalf, and shall also transmit to the client a copy of the brief for the Commonwealth as well as copies of all other substantive documents in the appellate proceedings. Assigned counsel must also submit a copy of the brief or new trial motion to the Criminal Appeals Unit, Private Counsel Division.
16. Because there is no longer a right to oral argument in every criminal appeal, the appellate defender shall file a reply brief when necessary to respond to any portion of the Commonwealth's brief that either (1) raises significant new issues not discussed in the appellant's brief; or (2) materially misrepresents the facts or the law, or (3) materially misrepresents the issues or arguments raised in the appellant's brief.

17. The appellate defender shall promptly inform the client of the date, time and place scheduled for oral argument of the appeal as soon as the appellate defender receives notice thereof from the appellate court. The appellate defender shall not waive oral argument except in very unusual circumstances and only after (1) obtaining the approval of the Director of Criminal Appeals for the waiver and (2) obtaining the client's consent to waive oral argument.
18. The appellate defender shall promptly inform the client by letter of the decision of the appellate court in the client's case and shall promptly transmit to the client a copy of the decision.
19. If the decision of the Appeals Court is adverse to the client in whole or in part, the appellate defender shall promptly inform the client of the client's right pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure to make application to the Supreme Judicial Court for further appellate review of the case. Unless the client instructs the appellate defender not to do so, the appellate defender shall prepare and file on the client's behalf an application to the Supreme Judicial Court for further appellate review of the case within the time prescribed by said Rule 27.1. When the Supreme Judicial Court has ruled on the application for further appellate review, the appellate defender shall promptly inform the client by letter of the ruling.
20. In the event that the client's appeal is unsuccessful, the appellate defender shall have the discretion, upon the request of the client and subject to the approval of the Chief Counsel or the Chief Counsel's designee, to seek relief from the client's conviction by petition for writ of certiorari to the United States Supreme Court or in state court by a motion for new trial or other post-conviction relief when in the best judgment of the appellate defender there exists a reasonable possibility that such relief may be obtained.
21. In the event that the client's appeal is unsuccessful, the appellate defender shall advise the client of his right to seek federal habeas corpus relief if such relief is potentially available. Upon the request of the client, and subject to the approval of the Chief Counsel or the Chief Counsel's designee, the appellate defender shall request authorization for the appellate defender, or other counsel, to seek federal habeas corpus relief on behalf of the client, when in the best judgment of the appellate defender there exists a reasonable likelihood that such relief may be obtained.
22. In any case in which federal habeas corpus relief is potentially available but in which the appellate defender does not continue representation, the appellate defender shall explain to the client the one-year statute of limitations for the filing of a petition for a writ of habeas corpus in federal district court or for the filing of a motion for new trial in the state trial court when necessary to exhaust any federal constitutional issues for federal habeas review.

23. If a direct appeal is unsuccessful and a motion to revise and revoke sentence pursuant to Mass. R. Crim. P. 29 was either never previously filed or had been filed but denied, the appellate defender shall inform the client of the opportunity to file within sixty (60) days a motion to revise and revoke sentence and, if the client requests, shall timely file such motion so as to preserve the client's rights under Mass. R. Crim. P. 29. The appellate defender is authorized to further litigate the motion to revise and revoke but is not required to do so.
24. Representing clients before the Appellate Division of the Superior Court is the responsibility of trial counsel. However, if trial counsel is unable to represent the client before the Appellate Division of the Superior Court, then the appellate defender is obligated to do so.

1. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CLIENTS IN CIVIL COMMITMENT CASES

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

These standards generally describe the steps which should be taken by an attorney who is assigned pursuant to M.G.L. ch. 123, sec. 5, to represent a person in a civil commitment case who risks a six-month or one year civil commitment in a mental health facility. [See also standards for authority to treat proceedings which follow this section.]

1. The role of the attorney in a commitment case is to act as an advocate for the respondent, in opposition to the petition and to insure that the respondent is afforded all of his/her due process and other rights. At a minimum, counsel must insure that the petitioning facility is made to meet its burden of proving, beyond a reasonable doubt, that the respondent meets the criteria for commitment.
2. Immediately upon receipt of the assignment of a case the attorney shall: (a) file an appearance in court; (b) communicate with the client to inform the client of the assignment; (c) arrange to meet with the client (if the attorney's schedule does not permit him/her to meet with the client no later than the next business day and promptly begin to work on the case, the attorney shall decline the assignment); and (d) shall not agree to a continuance of the case without first consulting with the client and obtaining his/her consent.
3. The attorney shall meet with the client as soon as possible, but in no event later than the next business day following the assignment. The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, to explain the commitment law and procedures to the client, to discuss the alternatives to continued hospitalization available to the client, to determine the client's version of the facts which led to the filing of the petition, and to determine the client's wishes regarding the litigation. While not required, the attorney should seek to obtain from his/her client written authorization to examine the client's medical record or, where the client is unable or unwilling to provide such authorization, a court order authorizing such examination. Finally, the attorney shall discuss the possibility of an independent evaluation.
4. If the attorney believes an independent examination will aid the client, and the client agrees to such an evaluation, the attorney shall file a motion for funds for an independent examination by a clinician of the client's choice and at the Commonwealth's expense. The client should be advised that such an examination will take time and may cause delay.
5. The attorney shall contact the independent clinician if a motion for funds is allowed. The attorney shall remind the doctor that his/her report is the property of the client and should be sent to the attorney, and that the report is not to be filed with the court or disclosed to the hospital attorney or staff

without the permission of the patient's attorney. See *Commonwealth v. Thompson*, 386 Mass. 811 (1982). The attorney should also remind the doctor that the purpose of the examination is to evaluate: (i) the client's current mental state; (ii) the likelihood of serious harm if the client were to be discharged; (iii) the client's ability to care for himself outside of the hospital; (iv) the feasibility of any less restrictive alternatives to hospitalization; and (v), if commitment to Bridgewater State Hospital is sought, the need for "strict security."

6. The attorney shall thoroughly investigate the facts. This investigation shall include reading the complete medical records and interviewing the hospital staff, including the doctors, nurses, social workers and other staff. The attorney should also speak to other patients on the ward, friends and family members of the client, and staff of any other programs familiar with the client.

7. The attorney shall use formal discovery mechanisms if indicated and tactically advisable.

8. After reviewing the medical record and the commitment petition the attorney shall determine if any procedural defenses can be raised and, if appropriate, file appropriate motions with supporting memoranda. (Procedural defenses can be raised, for example, if the hospital failed to file the petition at the appropriate time or if the hearing has not been commenced within the four- or fourteen-day time period required by the statute, or if the petition fails to set forth facts in support of the petition. See *Hashimi v. Kalil*, 388 Mass. 607 (1983) and M.G.L. c.123, §7(c)).

9. After developing a thorough knowledge of the law and facts of the case, the attorney shall meet again with his/her client for the purpose of discussing strategy and alternatives to commitment. The attorney shall discuss with the client any available alternatives to commitment. These may include the participation in an out-patient psychotherapy and counseling program, a community support program, a day treatment program, or placement in a less restrictive environment such as a half-way house, a group residence, or an apartment program. The attorney should make it clear to the client that the ultimate decision regarding the proposal of alternatives to commitment must be made by the client. The attorney should reassure the client that the attorney will stand behind the client's decision and forcefully advocate the client's position.

10. After this client meeting, and if appropriate, the attorney shall enter into negotiations with relevant persons concerning the case (e.g. discussions with the treating physician(s) regarding alternatives to hospitalization; discussions with social workers and DMH area office officials or other providers regarding the availability of alternative placements).

11. If the attorney and the hospital can agree to a negotiated settlement the attorney shall meet with her/his client to explain the terms of the agreement and obtain the client's consent to the settlement. Should the client decline the settlement offer, the attorney shall be prepared to try the civil commitment case.

12. Prior to the hearing the attorney shall identify potential witnesses who will testify in support of the client. Where necessary, witnesses should be subpoenaed. The attorney shall meet with the witnesses in advance of the trial in order to prepare them for direct and cross-examination. The

attorney shall review the medical record and identify those parts of the record which should not be admitted into evidence. The attorney should determine the identity of the hospital's witnesses in advance of the hearing, and make an effort, if tactically indicated, to interview them on the record and prepare appropriate cross-examination. The attorney shall discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney shall thoroughly prepare the client for direct and cross-examination.

13. During the hearing the attorney shall act as a zealous advocate for the client, insuring that the proper procedures are followed and that the client's interests are well represented.

14. After the hearing, the attorney shall meet with the client to explain the court's decision. If the client is committed, the attorney shall explain the client's right to appeal pursuant to M.G.L. ch.123, §9(a) and the client's right to file a petition for discharge in the superior court under M.G.L. ch.123, §9(b), and shall assist the client in doing so. (Where an appeal is filed the attorney shall, without delay, notify CPCS' Mental Health Litigation Unit in order that appellate counsel may be assigned). The attorney shall review the evidence which was presented at the hearing in order to advise the client about any steps the client can take during the commitment period in order to be discharged from the hospital.

2. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CLIENTS IN AUTHORITY TO TREAT ("SUBSTITUTED JUDGMENT") CASES

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

These standards describe the steps which should be taken by an attorney who has been assigned to represent the respondent in a guardianship proceeding or a proceeding under G.L. c.123, §8B in which the petitioner is requesting the authority to administer extraordinary medical treatment to the ward. Counsel is assigned to represent persons in these cases pursuant to *Rogers v. Commissioner of the Department of Mental Health*, 390 Mass. 489 (1983) and *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728 (1977). [See also standards for commitment proceedings which precede this section.]

1. The role of counsel in these cases is to be an advocate for the respondent, in opposition to the petition and to insure that the respondent is afforded all of his/her due process and other rights.

2. Immediately upon receipt of the assignment of the case the attorney shall (a) file an appearance in court; (b) notify petitioner's counsel of the assignment; (c) obtain a copy of the petition, the medical certificate, and any affidavits or other documents that were filed with the petition; (d) inform the client

of the assignment (If the attorney is unable to meet with the client and to promptly begin working on the case, or if the attorney is unable to appear in court on the assigned date, s/he shall decline the appointment); (e) the attorney should not agree to a continuance of the case without first consulting with the client and obtaining his/her consent.

3. The attorney shall meet with the client as soon as possible, but in no event later than 48 hours prior to hearing. At this meeting the attorney shall, at a minimum, explain to the client his/her right to make his/her own decisions regarding treatment, and ascertain the client's wishes. S/he shall explain the role of the attorney, the law, determine the client's version of the facts, and the client's wishes. While not required, the attorney should seek to obtain from his/her client written authorization to examine the client's medical record or, where the client is unable or unwilling to provide such authorization, a court order authorizing such examination. Finally, the attorney shall discuss the possibility of an independent

evaluation. See G.L. c.261, §27c(4) and Guardianship of a Mentally Ill Person, Mass.App.Ct. No. 85-0018 Civ. (Dreben, J.).

4. If the attorney believes an independent examination will aid the client, and the client agrees to such an evaluation, the attorney shall file a motion for funds for an independent examination by a clinician of the client's choosing and at the Commonwealth's expense. The client should be advised that such an examination will take time and may cause delay in hearing of the case.

5. The attorney shall contact the independent clinician if a motion for funds is allowed. The attorney shall remind the doctor that his/her report is the property of the client and should be sent to the attorney, and not be filed with the court or disclosed to the petitioner's attorney, without the permission of the respondent's attorney. The attorney should remind the doctor that the purpose of the examination is to evaluate the client's competence to make the decision regarding extraordinary medical treatment and, if appropriate, the client's substituted judgment.

6. The attorney shall thoroughly investigate the facts. This investigation shall include (a) review of the physician's certificate, or the clinical team report filed with the petition and the medical affidavit; (b) review of (i) hospital records, including medication history, (ii) Treatment Review Notes, including diagnoses, treatment history, and comments regarding the competence of the client, (iii) Unit and Nursing Notes, for the client's relationship with staff and degree of cooperation with treatment programs, and (iv) the client's Individual Service Plan; (c) interviewing of hospital staff, including doctors, nurses, and social workers, staff of other programs and other persons familiar with the client, and friends and family of the client.

7. The attorney shall use formal discovery mechanisms if indicated and tactically advisable. The attorney shall confer with the petitioner personally, or through counsel, whichever is appropriate, to determine the petitioner's reason for requesting the authorization to treat. The attorney shall confer with potential witnesses, including treating psychiatrists or psychologists, nursing and any other relevant staff, the prospective guardian, if any, and other possible witnesses suggested by the client. The attorney should also confer with other involved parties, for example, family members. Where necessary, witnesses should be subpoenaed. The attorney should meet with the witnesses in advance of the trial in order to prepare them for direct and cross-examination. The attorney shall review the medical record to identify those parts of the record which should not be admitted into

evidence. The attorney should identify the petitioner's witnesses and make an effort, if tactically indicated, to interview them on the record and prepare cross-examination.

8. The attorney should meet again with the client to discuss the upcoming hearing, and should keep him/her informed of the progress of case preparation. S/he shall inform the client of the witnesses expected to be called and any other evidence s/he will present. The attorney should also discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney should thoroughly prepare the client for direct and cross-examination.

9. The attorney should establish a record of the client's history in the following areas: (a) history of treatment with proposed treatment, if any, including side effects; (b) pattern of participation in inpatient and outpatient treatment; (c) relative success of previous treatment plans; (d) current treatment plan; (e) school record; (f) criminal record; (g) employment record; (h) home situation, and (i) religious belief.

10. After reviewing the petition and the medical record the attorney shall determine if any procedural defenses can be raised, and file appropriate motions with supporting memoranda (e.g., if the petition fails to set forth facts in support of the petition.)

11. Prior to the hearing the attorney shall (a) prepare requests for findings of fact and law to be presented at the close of evidence; (b) prepare any pretrial motions, memoranda, and requests for rulings; (c) prepare consistent direct and cross-examination questions; (d) prepare arguments to the judge.

12. During the hearing the attorney should act as a zealous advocate for the client, insuring that proper procedures are followed and that the client's interests are well represented.

13. After the hearing the attorney shall meet with the client to explain the court's decision. The attorney shall ensure that periodic reviews and an expiration date are incorporated into the court's decree, as well as provision for changing the decree if the client's condition changes. See Guardianship of Weedon, 409 Mass. 196 (1991). The attorney shall continue to represent the client for purposes of periodic reviews.

14. If appropriate, the attorney shall assist the client in filing an appeal. (Where an appeal is filed, the attorney shall, without delay, notify CPCS's Mental Health Litigation Unit in order that appellate counsel may be assigned.)

**COMMITTEE FOR PUBLIC COUNSEL SERVICES STANDARDS FOR
REPRESENTATION OF CLIENTS BY
MENTAL HEALTH APPELLATE COUNSEL**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel

assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

1. Immediately upon receipt of the assignment of a case to an appellate counsel, appellate counsel shall: (a) file an appearance in the appropriate court; (b) communicate with the client to inform the client of the assignment; and (c) determine whether a stay of a judgment or order of the lower court should be sought pending appeal. In the event a stay should be sought, counsel shall immediately seek one in accordance with Mass. R. App. Proc. 6. If appellate counsel would like the assistance of a mentor, s/he should request a mentor assignment.

2. Within five days of receipt of the assignment of an appeal, appellate counsel shall determine whether the provisions of Mass. R. App. Proc. 8 and 9(b) and (c) have been complied with, and if they have not, shall immediately take the steps required to comply including filing any necessary motions for extension of time.

3. Within three weeks after the assignment of a case to an appellate counsel, or, in the event that the transcript has not been completed at the time of the assignment, within three weeks after the receipt of the transcript, appellate counsel shall read the entire transcript and review the entire record of the case. Appellate counsel should at this time determine whether the record is accurate and complete and take such steps as may be necessary under Rule 8(c)-(e) to correct any errors. Appellate counsel shall also confer with any mentor assigned and with the appropriate Director about issues of law that may be raised on the client's appeal.

4. Appellate counsel shall keep the client and appropriate Director informed of all significant developments in the client's case. Appellate counsel shall respond in a timely manner to all correspondence from the client, provided that such correspondence is of a reasonable volume and at a reasonable interval. Appellate counsel shall inform the client and appropriate Director of the date, time and place scheduled for oral argument of the appeal as soon as the appellate counsel receives notice thereof from the appellate court.

5. Upon receiving notice of the assembly of the record, appellate counsel shall take the steps necessary to ensure the timely docketing of the appeal in accordance with Mass. R. Civ. Proc. 10(a)(1) and (3) and shall, where necessary, file appropriate motions for leave to proceed in forma pauperis pursuant to Mass. R. App. Proc. 12 or for payment or waiver of fees and costs, as necessary under G.L. ch. 261, §§27A through 27G.

6. After reading the transcript, appellate counsel shall confer with the client and with the trial counsel, if appropriate, about the issues which may be raised on the client's appeal. Appellate counsel should pay particular attention to whether a claim as to ineffective assistance of trial counsel may form the basis of an appeal. See, Care and Protection of Stephen, 401 Mass. 144 (1987).

7. If at any time the client insists on having briefed on his or her appeal a contention which, in the judgment of the appellate counsel, cannot be supported by any rational argument, the appellate counsel shall (a) immediately inform and consult with the relevant Director and if the Director concurs, (b) inform the client of the client's right with respect to such contention pursuant to *Commonwealth v. Moffett*, 383 Mass. 201, 203-209 (1981); (c) supply the client with a copy of the Moffett opinion; and (d) if the client thereafter wishes to invoke his or her Moffett rights with respect to such contention, comply in all respects with the guidelines of the Moffett case set forth *id.* at 208-209 and *n.* 3. *Care and Protection of Valerie*, 403 Mass. 317 (1988).

8. Appellate counsel shall timely file in the appropriate court all motions necessary or advisable to preserve and perfect the client's appellate rights, including, where necessary, motions pursuant to Rule 14(b) of the Massachusetts Rules of Appellate Procedure to enlarge the time for filing the brief on behalf of the client, and motions pursuant to Rule 8 of the Massachusetts Rules of Appellate Procedure to correct or expand the record.

9. The brief filed by appellate counsel on behalf of the client shall conform in all respects with Rules 16, 18 and 20 of the Massachusetts Rules of Appellate Procedure, and shall be of high quality.

10. Appellate counsel shall transmit to the client and the appropriate Director a copy of the brief filed on the client's behalf, and shall also transmit to the client a copy of the brief for the Commonwealth and copies of all other substantive documents pertaining to the appellate proceedings.

11. Oral argument of the appeal on behalf of the client should not, absent unusual circumstances and with the approval of the client and the appropriate Director, be waived with respect to any case.

12. The appellate counsel shall inform the client by letter of the decision of the appellate court in the client's case on the date the decision is delivered to the appellate counsel and shall transmit to the client and the appropriate Director a copy of the decision.

13. If the decision of the Appeals Court is adverse to the client, appellate counsel shall promptly inform the client of the client's right pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure to make application to the Supreme Judicial Court for further appellate review of the case; and, if the client requests that such application be made, the appellate counsel shall prepare and file on the client's behalf such application within the time prescribed by said Rule 27.1.

14. In the event that the client's appeal is unsuccessful, appellate counsel shall have the discretion, upon the request of the client and subject to the approval of the appropriate Director, to seek relief when in the best judgment of the appellate counsel there exists a reasonable likelihood that such relief may be obtained, by appeal or petition in the federal courts.

**CPCS PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION
OF CLIENTS IN "SEXUALLY DANGEROUS PERSON" PROCEEDINGS**

These standards generally describe the steps which should be taken by an attorney who is assigned pursuant to G.L. c. 123A, § 9 or § 12 to represent a person facing commitment to or continued confinement at the Massachusetts Treatment Center for Sexually Dangerous Persons (Treatment Center) in Bridgewater as a "sexually dangerous person."

1. The role of the attorney in a SDP commitment case is to act as an advocate for the client, and to insure that the client is afforded all of his/her due process and other rights. *Cf. In the Matter of the Mental Health of KGF*, 306 Mont. 1; 29 P.3d 485 (2001). At a minimum, counsel must do his or her best to insure that the Commonwealth is made to sustain its burden of proving, beyond a reasonable doubt, that the client meets the criteria for commitment.
2. Immediately upon receipt of the assignment of a case the attorney shall: (a) file an appearance in court; (b) communicate with the client to inform the client of the assignment; (c) arrange to meet with the client as soon as possible (see also ¶ 3, below), and (d) promptly begin work on the case. If the attorney's schedule does not permit him/her to fulfill these requirements, the attorney shall decline the assignment absent special arrangements with the CPCS Mental Health Litigation Director or Sexually Dangerous Persons Litigation Coordinator. The attorney shall not agree to a continuance of the case without first consulting with the client and obtaining his/her express agreement.
3. In proceedings under § 12, the attorney shall meet with the client at the Treatment Center at the earliest possible opportunity prior to the probable cause hearing; absent serious and unavoidable scheduling conflicts, this meeting shall take place within ten days of the attorney's appointment. In proceedings under § 9, the attorney shall meet with the client as soon as practicable. The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, to explain the SDP law and procedures to the client, to determine the client's version of the pertinent facts, and to determine the client's wishes regarding the litigation. The attorney should seek to obtain from his/her client written authorization to examine the client's Department of Correction (DOC), medical, and treatment records or, where the client is unable or unwilling to provide such authorization, a court order authorizing such examination. Finally, the attorney shall inform the client of his/her right to independent evaluations, and shall discuss hiring independent evaluators at the expense of the Commonwealth.
4. During all hearings and throughout his/her representation of the client, the attorney shall act as a zealous advocate for the client, insuring that the proper procedures are followed, and that the client's interests are well represented.
5. Except as described herein, the attorney shall file a motion for funds for an independent examination at the Commonwealth's expense as soon as practicable. The client should be advised that such an examination will take time and may cause delay. While it is usually advisable to delay the probable cause hearing until such time as a defense expert is retained and sufficiently prepared, counsel need not retain an expert where the client, after being fully informed of his/her rights by the

attorney, decides that s/he would rather proceed to the probable cause hearing as quickly as possible than take the time necessary for the expert to be retained and prepare for the hearing.

6. Upon the allowance of his/her motion for funds, the attorney shall retain the services of one or more capable independent forensic or clinical evaluators in sufficient time for them to prepare for and testify at the probable cause hearing or § 9 hearing. The attorney shall make a determination, based upon the circumstances of the particular case (e.g., the risk assessment methodology relied upon by the Commonwealth's expert), as to which independent evaluators likely would be of most assistance to the attorney and client. If the attorney is unfamiliar with the different schools of sex offender risk assessment and their adherents, s/he shall contact the CPCS SDP Litigation Coordinator to discuss the matter. The attorney shall make an informed decision concerning whether it is wiser to have the evaluator(s) examine the client or concentrate solely on challenging the conclusions of the Commonwealth's experts. Such decision shall be based on caselaw (see, e.g., Commonwealth v. Reese, 438 Mass. 519 (2003)) and the strengths and weaknesses of both the client's and the Commonwealth's case.

7. The attorney shall inform the evaluators in writing that their reports, and any information gleaned in the process of conducting their examinations, are the property of the client and should be sent or divulged only to the attorney, and that the report is not to be filed with the court or disclosed to the Commonwealth or to the Treatment Center attorney or staff without the permission of the attorney. See Commonwealth v. Thompson, 386 Mass. 811 (1982). Except where the evaluator is hired solely to challenge the methodology of the Commonwealth's experts, the attorney shall remind the evaluator(s) that the purpose of the examination is to evaluate: (i) whether the client currently suffers from a mental abnormality or personality disorder; (ii) if so, whether the mental abnormality or personality disorder makes the client likely to engage in sexual offenses if not confined to a secure facility; and (iii) whether the client suffers from impaired volitional control.

8. At the probable cause hearing, except where a Commonwealth's expert concludes that the client is not a sexually dangerous person, the attorney shall move to exclude such expert's opinion concerning the client's risk of reoffense and/or other conclusions as unreliable pursuant to Commonwealth v. Lanigan, 419 Mass. 15, 24-27 (1994), and for any other viable ground. A model Lanigan motion is available from the CPCS SDP Litigation Coordinator.

9. Counsel shall file a Motion for Release from Temporary Commitment pursuant to G.L. c. 123A, § 12(e) whenever the pendency of the SDP proceeding prevents the client's release from custody following the expiration of his/her underlying sentence.

10. The attorney shall provide informed advice to the client as to whether, and if so when, he/she should participate in any evaluations sought to be conducted by the Commonwealth's experts.

11. The attorney shall request transcripts of the probable cause hearing in all cases where probable cause is found and forward a copy thereof to the CPCS SDP Litigation Coordinator.

12. Upon a finding of probable cause, the attorney shall move for funds sufficient to retain the services of at least two independent forensic or clinical evaluators to evaluate the client, to assess the

conclusions of the Commonwealth's experts and the reliability and foundation thereof, to otherwise assist counsel in preparation for trial, and to testify at trial. The attorney shall otherwise follow the standards regarding expert witnesses outlined in paragraphs 6 and 7, *supra*.

13. The attorney shall thoroughly investigate the facts. This investigation shall include reading the complete records provided by the DOC and the Commonwealth, including police reports and all other records from the client's past criminal offenses, and interviewing institutional staff at DOC institutions, including the Treatment Center, prior therapists or other evaluators or treatment providers, family members, friends, and other persons who might provide evidence about the client. If the attorney is unable to perform such investigation him/herself, s/he shall file a motion with the trial court requesting funds to hire an investigator to perform these tasks. The attorney shall familiarize him/herself with the scientific literature regarding sexual disorders and recidivism risk assessment sufficiently to undertake, with the assistance of the defense experts, a searching review of the Commonwealth's experts' reports to determine the factual and scientific legitimacy of their findings.

14. The attorney shall use formal discovery mechanisms to the extent permitted by the trial court. The attorney shall subpoena all of the Commonwealth's experts' files regarding the client, and, if permitted by the court, shall depose all Commonwealth's experts.

15. After reviewing the medical record and the Commonwealth's pleadings the attorney shall determine if any procedural defenses or objections can be raised and, if appropriate, file appropriate motions with supporting memoranda. [Procedural defenses can be raised, for example, if the client has completed his/her sentence for a sexual crime and has subsequently been re-incarcerated for a non-sexual offense (See Commonwealth v. McLeod, 437 Mass. 286 (2002)); if the Court failed to schedule a timely probable cause hearing (See Commonwealth v. Bruno, 432 Mass. 489, 513 (2000)); if the Commonwealth fails to petition for trial within 14 days of the filing of the qualified examiners' reports (See Commonwealth v. Kennedy, 435 Mass. 527 (2001)); or if the Commonwealth fails to bring the respondent to trial within sixty days of the conclusion of the probable cause hearing (See Kennedy, *supra*; Commonwealth v. Gagnon 439 Mass. 826 (2003)).] As at the probable cause hearing, the attorney shall move for the exclusion of the Commonwealth's expert witnesses' opinions concerning the client's risk of reoffense and/or other conclusions as unreliable pursuant to Commonwealth v. Lanigan, 419 Mass. 15, 24-27 (1994), except where a particular Commonwealth's expert concludes that the client is not a sexually dangerous person. The attorney shall move to preclude the Commonwealth's experts or any other Commonwealth witness from testifying to inadmissible information (e.g., hearsay or privileged communications, See Commonwealth v. Markvart, 37 Mass. 331 (2002)), or from offering an opinion which does not comport with the evidentiary requirements of Markvart and Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 531 (1986). If motions to exclude testimony are denied, the attorney shall renew objections to all such testimony when offered at trial or hearing. See Commonwealth v. DiGiacomo, 57 Mass. App. Ct. 312 (2003); Commonwealth v. Gabbidon, 398 Mass. 1, 7 (1986).

16. After developing a thorough knowledge of the law and facts of the case, the attorney shall meet again with his/her client for the purpose of discussing strategy for the trial or § 9 hearing.

17. Prior to trial or § 9 hearing, the attorney shall identify and subpoena potential witnesses who will testify in support of the client. The attorney shall meet with the witnesses in advance of trial in order to prepare them for direct and cross-examination. The attorney shall review the record and identify those parts of the record which should not be admitted into evidence. The attorney shall determine the identity of the Commonwealth's witnesses in advance of trial, and, should the court deny the attorney's motion to depose such witnesses, shall attempt to interview them. The attorney shall prepare appropriate cross-examination. The attorney shall discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney shall thoroughly prepare the client for direct and cross-examination.

18. In proceedings under § 9, or upon the filing by the commonwealth of a petition for trial pursuant to G.L. c. 123A, § 14(a), the attorney shall enter a jury demand, and shall prepare for trial on the presumption that the case will be tried to a jury. Thereafter, the jury demand shall be withdrawn only upon the informed decision of the client.

19. Absent compelling circumstances, the attorney shall move for individual voir dire of all members of the jury panel.

Post-trial

20. After trial or § 9 hearing, the attorney shall meet with the client to explain the court's decision. If the client is committed or ordered to remain at the Treatment Center, the attorney shall explain the client's right to appeal. Absent specific and knowing instructions from the client to the contrary, the attorney shall file a timely notice of appeal, a request for a cassette (or, if available, an electronic) copy of the proceedings, and a motion for funds for the transcription thereof. Where an appeal is filed the attorney shall, without delay, notify CPCS' Mental Health Litigation Unit in order that appellate counsel may be assigned. The attorney shall cooperate fully with appellate counsel. If the client is newly committed to the Treatment Center, the attorney shall also explain to the client his/her right to file a petition for discharge in the superior court under G.L. c. 123A, § 9.

Section 9 Proceedings

21. If the attorney is appointed to represent the client pursuant to a petition for discharge under G.L. c. 123A, § 9, the attorney shall follow all of the steps outlined above except for those pertaining to probable cause hearings. In addition, the attorney shall move the court for a speedy hearing on statutory and constitutional grounds. The attorney may obtain a model motion for a speedy hearing from the CPCS SDP Litigation Coordinator.

**PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND
PARENTS IN CHILD WELFARE CASES¹**

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¹ These Performance Standards apply to the representation of children and parents in care and protection proceedings, proceedings under G.L. c. 119, § 23C and proceedings to dispense with consent, as well as divorce, custody, guardianship and other proceedings in which a right to counsel exists. These standards do not apply to the representation of children in Children in Need of Services (CHINS) proceedings, pursuant to G.L. c. 119, § 39G.

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1. GENERAL PRINCIPLES OF REPRESENTATION

1.1 Role of Counsel.

(a) The role of counsel in these cases is to be an advocate for the client within the scope of counsel's appointment. Counsel shall diligently and zealously protect and advance the client's interests, rights and goals in the proceedings. This involves explaining the nature of all legal and administrative proceedings to the extent possible given the client's age and ability, determining the client's position and goals, and vigorously advocating such position and goals. The role of counsel is also to ensure that the client is afforded due process and other rights and that the client's interests are protected.

(b) The role of counsel also is to be an advisor and counselor. This involves explaining the likelihood of achieving the client's goals and, where appropriate, identifying alternatives for the client's consideration. In addition, counsel should explain the risks, if any, inherent in the client's position.

(c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation to the client.

(d) Counsel for a child owes the same duties of undivided loyalty, confidentiality, zealous advocacy and competent representation to the child as is due an adult client, consistent with the Massachusetts Rules of Professional Conduct.

Commentary: The child's counsel should not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child. Regardless of any alignment of position among the child and other parties, child's counsel should develop his or her own theory and strategy of the case and ensure that the child has an independent voice in the proceedings. Although the child's position may overlap with the position of one or both parents, third-party caretakers or the Department of Social Services ("DSS"), child's counsel should be prepared to present his or her client's position independently and to participate fully in any proceedings.

When consistent with the client's interest, counsel should take every appropriate step to expedite the proceedings.

1.2 Appointment of Counsel.

(a) Immediately upon acceptance of an appointment to represent a party, counsel shall, where required, file a notice of appearance with copies to all counsel and, where necessary or strategically important, an objection to the petition on the client's behalf.

(b) Counsel shall decline the assignment if (i) counsel is unable to afford the client prompt, diligent representation, (ii) acceptance of the assignment will create a conflict or potential conflict of interest, or (iii) counsel believes that he or she will not be able to comply with these Performance Standards. If counsel declines an assignment, counsel shall give proper notice to the court.

Commentary: Counsel cannot provide prompt, diligent representation of a client if (a) counsel is unable to begin working on the case promptly or (b) counsel is unable to appear in court on an assigned date and cannot arrange a continuance that is consistent with the client's interests. It is counsel's responsibility to be aware of the caseload limits of the Committee for Public Counsel Services ("CPCS") found in the CPCS Manual for Assigned Counsel (2003). Counsel should not accept any assignment which will cause him or her to exceed these limits.

1.3 Scope of Representation.

(a) Duration. A case at the trial level begins upon appointment. If counsel represents a parent or a child, a case concludes upon the earliest of the following:

1. The child is adopted;
2. The child attains majority;
3. The only subject child, or the client, has died;
4. Counsel has withdrawn for all purposes (not for purposes of obtaining appellate counsel);
5. The court has struck counsel's appearance, or the appearance of the client, and no appeal has been filed regarding such action;
6. The case is dismissed, and no appeal has been filed;
7. The child is the subject of an allowed guardianship petition (as opposed to the appointment of a temporary guardian), and no appeal has been filed; and
8. The entry of any other order by the court not already specified above that is intended by the court as a final disposition of the matter.

In addition, if counsel represents a parent, a case concludes upon the earliest of the following:

9. A petition to dispense with the parent client's rights has been allowed, and no appeal has been filed; and
10. Upon conclusion of an appeal of an order under 5 through 9 above.

Commentary: Courts on occasion enter orders that, although not authorized under G.L. c. 119, § 26, are intended as a final disposition of the matter. Examples include the granting of "permanent" custody to a third party other than DSS under § 26, or the allowance of a guardianship petition and the "off-listing" of the C&P. Regardless of the legality of such orders, CPCS treats these as events that trigger the termination of the right to counsel. With respect to Standard (a)8 above, counsel should be aware that G.L. c. 119, § 26 does not currently permit a disposition of permanent custody to a third party, although such orders are commonly entered.

Counsel should also be aware that a case is not considered concluded because there has been no recent court activity on the case.

Counsel withdrawing from a case should follow the rules set forth in Standard 8.3.

(b) Appointment of Appellate Counsel. The appointment of appellate counsel on behalf of a client shall not terminate trial counsel's ongoing responsibilities to the client in proceedings before the trial court.

(c) Collateral Representation. Clients occasionally require legal assistance in proceedings before the Probate and Family Court, District Court or Juvenile Court on matters other than, but integrally related to, that for which counsel was appointed. Such proceedings, which may arise prior or subsequent to the commencement of the proceeding for which counsel was appointed, include, but are not limited to, divorce, custody, guardianship and paternity proceedings. Counsel appointed to represent a client in one proceeding may, with CAFL written permission, bill CPCS for representation of a client in these types of collateral proceedings that (a) directly affect the resolution of an open proceeding for which counsel was appointed, and (b) concern the custody of child(ren) that is the subject(s) of the proceeding for which counsel was appointed. Counsel may, without notice to CAFL, represent a client at a Fair Hearing of the Department of Social Services which (a) directly affects the resolution of an open proceeding for which counsel was appointed, and (b) concerns the child(ren) that is the subject(s) of the proceeding for which counsel was appointed. CPCS reserves the right to deny payment for work done on collateral matters where permission was not requested or was refused.

Authorization for any collateral representation set forth herein ends at the earlier of (a) final judgment in the collateral matter, or (b) the occurrence of any event set forth in paragraph (a) "Duration" above. In no event will authorization be given for collateral representation in any matter which requires CPCS certification not held by counsel.

Commentary: In care and protection and § 23C proceedings, both children and parents are entitled to continued representation in post-trial matters, including foster care reviews, permanency hearings and review and redetermination proceedings. In actions to dispense with consent, the child is entitled to

continued representation so long as he or she remains in the custody of DSS. Upon adoption or guardianship finalization, counsel's representation ends. There is no right to counsel in proceedings which are solely disputes between private parties, such as disagreements between birth parents and adoptive parents or guardians over post-adoption or post-guardianship visitation.

In the appropriate circumstance and upon a written request, CPCS will re-open a Notice of Assignment of Counsel ("NAC") to permit counsel to bill CPCS for representation of a client after the NAC has been closed. For example, counsel may file a motion seeking relief from judgment where sufficient grounds exist. Forms for requesting re-opening of a NAC are available on the CPCS CAFL website.

1.4 Conflicts of Interest.

Counsel must be alert to and avoid all potential and actual conflicts of interest that would impair the ability to represent a client. Particularly when appointed to represent multiple clients, counsel must be alert to the potential for conflicts of interest. The presence of a conflict may require counsel to withdraw from representing one, some or all of the clients. In such event, counsel shall request that the court appoint new counsel.

Commentary: Conflicts arise when an attorney is appointed to represent multiple siblings who have different positions (e.g., one child supports the petition and another child opposes the petition). Even though a court may find a parent fit as to one child but not another, counsel cannot, consistent with the ethical rules, simultaneously advocate a parent's fitness as to one child and unfitness as to another.

A conflict also may arise where an attorney is appointed to represent more than one parent. In situations where there are allegations of domestic violence, counsel should not represent both parents. Even in a case where multiple clients share the same position, a conflict may arise if counsel receives a confidence from one client that the client wishes not be disclosed, but disclosure would advance the interests of the other client. See Mass. R. Prof. C. 1.7, Comment 12C.

Counsel must be alert to the potential for conflict not only at the time of appointment but throughout the representation. A client's position may change as time passes, resulting in a conflict where none existed previously.

The Rules of Professional Conduct permit a lawyer to represent multiple clients, notwithstanding a conflict, if the lawyer reasonably believes to do so would not adversely affect the representation and if each client consents. See Mass. R. Prof. C. 1.7 and Comments. Rarely, if ever, would a situation arise where all the children are competent to consent and, therefore, as a general rule, counsel should always seek to withdraw from representing one or more child clients if a conflict exists among them. Counsel should be mindful of the conflict in continuing to represent any of the multiple clients when counsel holds confidences from some or all of the clients.

Counsel should also be cautious of the potential for conflict of interest in cases where the interests of the client are closely aligned with another, unrepresented person, (e.g., between a preadoptive parent

or relative caretaker). Counsel should never agree to represent such other person. Child's counsel should also be aware of the conflict inherent in accepting any role other than counsel; for example, counsel should not act as a parent proxy in signing an Individualized Education Plan.

In accepting assignments, former DSS attorneys should be mindful of the rules regarding conflicts of interest and successive government and private employment. See Mass. R. Prof. C. 1.7-1.11. Lawyers who practice separately in an office-sharing arrangement should similarly be mindful of the conflict of interest rules and other rules set forth in Commonwealth v. Allison, 434 Mass. 670 (2001), and other appellate cases.

1.5 Communications with Client.

In all cases counsel must maintain sufficient contact with the client to establish and maintain an attorney-client relationship that will enable counsel to keep abreast of the client's interests and needs and of the client's position in the action.

(a) Immediately upon receipt of notice of the assignment, counsel shall take appropriate steps to locate his or her client. Counsel shall inform the client of the assignment and meet with the client as soon as practicable. To the extent possible, the initial meeting should take place sufficiently prior to the first court hearing to permit counsel to prepare for such hearing. As soon as practicable, and to the extent possible given the client's age and abilities, counsel shall explain to the client the nature of the court proceedings and applicable law, the role of counsel, and the existence of and limits to privileges covering the client's communications with counsel, therapists, social workers and other relevant individuals. Counsel shall also determine the client's interests, goals and position in the proceeding.

(b) At a minimum, counsel shall meet with a child client on a quarterly basis, except under extraordinary circumstances. Irrespective of a child client's age, counsel shall meet with the child client at his or her placement promptly upon receiving notice of the assignment. Counsel shall meet with the child thereafter as necessary to provide competent representation to the client, to be informed of the child's wishes and circumstances, to inform and advise the client about the proceedings, as appropriate, and to maintain an ongoing attorney-client relationship with the child.

Commentary: Establishing and maintaining a relationship with the child client is the foundation of representation. It is often more difficult to develop a relationship and trust with a child client than with a parent client. Meeting with the child regularly allows counsel to develop a relationship with the client and to assess the child's circumstances. The child's position, interests, needs and wishes change over time. Counsel cannot be fully informed of such changes without developing a relationship through frequent contacts.

Accordingly, counsel must meet with child clients at least quarterly. The extraordinary circumstances under which counsel may meet with a child client less than quarterly include situations where the child is "on the run" and his or her whereabouts are unknown, there is strong evidence that the child will be adversely affected by meeting with counsel, the child refuses to meet with counsel, or the child is placed at a distance that makes quarterly meetings impracticable. Counsel should meet with a child

client immediately after becoming informed of a change in the child's placement. Counsel should be wary of communicating with child clients through letters or e-mail. Children may not receive such communications, or may not be the only ones to read such communications. This places the attorney's work product and attorney-client privilege at risk.

In order to provide competent representation, child's counsel should meet with the child in the child's environment to understand the child's personal context. The benefits of meeting with an older child who can convey information and express his or her wishes are obvious. However, meeting with younger children, including preverbal children, is equally important. Mass. R. Prof. C. 1.14 recognizes the value of the child client's input and further recognizes that varying degrees of input from children at different developmental stages may occur. In addition, preverbal children can provide valuable information about their needs through their behavior, including their interactions with their caretakers and other children or adults.

(c) Counsel shall remain in communication with the client during the course of the case to discuss, to the extent possible given the client's age and abilities, the progress of the case, trial strategy and preparation, negotiation and settlement strategies, and post-trial goals. Counsel shall inform the parent client of all court hearings and administrative proceedings and inform such client of his or her right and/or obligation to attend such hearings. Where appropriate given the child's age and abilities, counsel should inform the child client of court hearings and administrative proceedings. If the child client expresses a desire to attend a hearing, and such attendance is appropriate given the child's age and abilities and the nature of the proceedings, counsel shall take steps to assure the child's attendance. If the client is involuntarily committed or incarcerated and wishes to attend a hearing, counsel shall make all necessary arrangements for the court to issue a writ of habeas corpus to assure the client's presence at the hearing, and shall, if necessary, ensure service of the writ.

(d) Counsel shall explain the result of all court hearings and administrative proceedings to the client. If a final judgment is adverse to the client, counsel shall explain the client's right to appeal the decision, the appellate process, including the time limits in which a notice of appeal must be filed, and any alternative post-judgment strategy that may be appropriate. Counsel shall also explain the process and availability of post-trial reviews, if applicable. If a final judgment is not adverse to the client, counsel shall ensure that opponents adhere to time limits and discharge other appellate responsibilities until appellate counsel files an appearance. In communicating the results of court hearings and administrative proceedings to a child client, counsel shall provide such information as is appropriate given the child's age, abilities and wish to be so informed.

Commentary: Where counsel is unable to communicate effectively with the client because of either mental disability or language barriers, counsel should take whatever steps are necessary to ensure that he or she is able to communicate with the client and that the client understands the proceedings. Such steps may include obtaining expert assistance or an interpreter.

The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning, implications and consequences of legal proceedings. A client may not understand the legal terminology and, for a variety of reasons, may choose a particular course of action without fully appreciating the implications. With a child the potential for misunderstanding may be even greater.

Therefore, the child's attorney has additional obligations based on the child's age, level of education, and language skills. There is also the possibility that, because of a particular child's developmental limitations, counsel may not completely understand the child's responses. Therefore, child's counsel must learn how to ask developmentally appropriate questions and how to interpret the child's responses. The child's attorney may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

Counsel should contact clients regularly, and should respond promptly to telephone calls, letters and other inquiries from the client.

1.6 Determining and Advocating the Child Client's Position.

(a) Child's counsel should elicit the child's preferences in a developmentally appropriate manner, advise the child and provide guidance.

Commentary: Counsel has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determining his or her position. Counsel must be adept at asking developmentally appropriate questions and interpreting the child's responses in such a manner as to obtain a clear understanding of the child's preferences.

In eliciting the child's preferences, counsel should be aware of and understand the factors that influence the child's decision-making process. In addition to communicating with the child client as discussed in Standard 1.5 above, counsel should review records and consult with appropriate professionals and others with knowledge of the child. Counsel also may find it helpful to observe the child's interactions with foster parents, birth parents and other significant individuals. This information will help counsel to better understand the child's perspective, priorities and individual needs, and will assist counsel in identifying relevant questions to pose to the child.

Counsel should advise the client of the potential consequences of particular positions. Counsel may express an opinion concerning the likelihood of the court or other parties accepting particular positions. Counsel may inform the child of an expert's recommendations germane to the issue. Counsel should recognize that the child may be more susceptible to the lawyer's influence than some adult clients, and should ensure that the child's expressed preferences reflect his or her actual position.

(b) If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel shall represent the child's expressed preferences regarding that matter.

Commentary: Rule 1.2 of the Massachusetts Rules of Professional Conduct requires counsel to "seek the lawful objectives of his or her client." Only if the lawyer determines that the client is incapable of making adequately considered decisions in connection with the representation, may counsel deviate from this requirement, and even then counsel must "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." See Mass. R. Prof. C. 1.14, Client Under a Disability.



A child's ability to determine his or her own position may depend upon the particular matter to be determined or the circumstances involved at the time. Thus, a child may be able to make some decisions and not others. For example, counsel may reasonably determine that the child is capable of deciding that he or she would like to have visits with a sibling, but is not capable of deciding whether he or she should return home or remain with relatives on a permanent basis. Additionally, as time passes and the child matures, he or she may become more capable of directing the representation.

In determining whether a child is able to make an adequately considered decision, counsel may wish to seek guidance from appropriate professionals and others with knowledge of the child, including the advice of an expert. Counsel may consider the following factors: the child's ability to communicate a preference, whether the child can articulate reasons for the preference, the decision making process used by the child to arrive at the decision (e.g., is it logical, is it consistent with previous positions taken by the child, does the child appear to be influenced by others, etc.); and whether the child appears to understand the consequences of the decision. See Report of the Working Group on Determining the Child's Capacity to Make Decisions, 64 Fordham Law Review 1339 (1996). In assessing the child's ability to make adequately considered decisions, it is the quality of the child's decision-making, not the wisdom of the child's decision, that is determinative. For example, the decision of a thirteen-year-old to return home to a marginally fit parent may not be in the child's best interests, but the child may well be competent to make that decision.

If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel must represent the child's expressed preferences regarding that matter, even if the attorney believes the child's position to be unwise or not in the child's best interest. Requesting the appointment of a guardian ad litem in such cases is contrary to the Rules of Professional Conduct. Of course, the lawyer does have a counseling function and should advise the client of the potential consequences of his or her position. However, the child's attorney should recognize that the child may be more susceptible to the lawyer's influence than some adult clients, and should ensure that the decision the child ultimately makes reflects his or her actual position.

(c) If a child client is incapable of verbalizing a preference, counsel shall make a good faith effort to determine the child's wishes and represent the child in accordance with that determination or may request appointment of a guardian ad litem/next friend to direct counsel in the representation.

Commentary: If a child is incapable of verbalizing a preference, counsel may make a substituted judgment determination, i.e., determine what the child would decide if he or she were capable of making an adequately reasoned decision, and represent the child in accordance with that determination. Alternatively, counsel may ask for the appointment of a guardian ad litem to make a substituted judgment determination and to provide direction to counsel concerning the representation. If a guardian ad litem is appointed, counsel should ensure that the role of the guardian ad litem is clearly defined by the court.



In making a substituted judgment determination, counsel may wish to seek guidance from appropriate professionals and others with knowledge of the child, including where necessary, the advice of an expert.

Counsel should not confuse inability to express a preference with unwillingness to express a preference. If an otherwise competent child chooses not to express a preference on a particular matter, counsel should determine if the child wishes the attorney to take no position in the proceeding, or if the child wishes the attorney or someone else to make the decision for him or her. In either case, the attorney is bound to follow the client's direction.

(d) If a child can verbalize a preference with respect to a particular matter, but counsel reasonably determines, pursuant to paragraph (b) above, that the child is not able to make an adequately considered decision regarding the matter ~~and if representing the child's expressed preferences does not place the child at risk of substantial harm, then counsel shall represent the child's expressed preferences.~~

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If the child is not able to make an adequately considered decision regarding the matter and if counsel determines that pursuing the child's expressed preferences would place the child at risk of substantial harm, counsel may choose one of the following options:

- (i) represent the child's expressed preferences regarding the matter;
- (ii) represent the child's expressed preferences and request the appointment of a guardian ad litem/investigator to make an independent recommendation to the court with respect to the best interests of the child;
- (iii) inform the court of the child's expressed preferences and request the appointment of a guardian ad litem/next friend to direct counsel in the representation; or
- (iv) inform the court of the child's expressed preferences and determine what the child's preferences would be if he or she was able to make an adequately considered decision regarding the matter and represent the child in accordance with that determination.

Commentary: The most difficult aspect of representing child clients in these cases is determining what position to take when a child can verbalize a preference but counsel believes that the client is not capable of weighing the various options or understanding the consequences of pursuing particular positions.

The Rules of Professional Conduct provide some limited guidance. Rule 1.14(a) provides that where a client is unable to make "adequately considered decisions," the attorney must "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Further, the commentary to the Rule recognizes that there exist "intermediate degrees of competence" and that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Thus, at a minimum, counsel's obligation includes informing the court of the child's expressed preferences.

If the incompetent child's expressed preferences will not subject the child to a risk of substantial harm, counsel is obligated to pursue the child's wishes. Mass. R. Prof. C. 1.14(b) provides that only when the client is incompetent and the attorney believes the client is at risk of substantial harm, may counsel take certain steps to protect the client.

If counsel believes the position chosen by the incompetent child is wholly inappropriate or could result in serious injury to the child, the ethical issues are far more difficult. Of course, the lawyer has a counseling function and should advise the client of the potential consequences of his or her position. However, the child's attorney should recognize that the child may be more susceptible to the lawyer's influence than some adult clients, and should ensure that the decision the child ultimately makes reflects his or her actual position.

If the child cannot be persuaded to change his or her position, paragraph (b) of Mass. R. Prof. C. 1.14 states that when the client is incompetent and the attorney believes the client is at risk of substantial harm, the attorney may take certain steps to protect the client, such as consulting with family members or protective agencies and, if necessary, requesting the appointment of a guardian ad litem. In addition, the commentary to the Rule notes that if a guardian is not appointed, "the lawyer often must act as de facto guardian."

Thus, if counsel believes that advocating the incompetent child's expressed preferences will place him or her at risk of substantial harm, counsel may advocate the child's expressed preferences and request the appointment of a guardian ad litem to make an independent recommendation to the court with respect to the child's best interests. Alternatively, counsel may use a "substituted judgment" standard (i.e., what the child would decide if he or she were competent to do so) to arrive at the child's position, either by making the substituted judgment determination himself or herself, or by asking for the appointment of a guardian ad litem to make that determination and direct counsel accordingly. A substituted judgment determination is not the same as determining the child's best interests. Rather, it involves determining what the child would decide if he or she were able to make an adequately considered decision. If the child is able to verbalize a preference but is not capable of making an adequately considered decision, the child's verbal expressions are an important factor to consider in making a substituted judgment determination.

If the substituted judgment determination and the child's expressed preferences differ, the commentary to Mass. R. Prof. C. 1.14 suggests that counsel must inform the court of both.

1.7 Determining and Advocating an Adult Client's Position.

Counsel shall advocate for an adult client's stated preferences and goals in the proceeding and follow the client's direction throughout the course of the case. Counsel should determine whether the client is "under a disability" pursuant to Rule 1.14 of the Massachusetts Rules of Professional Conduct and shall act accordingly. Nothing herein limits counsel's ability to make strategic legal decisions in the case.

Commentary: Counsel should be very cautious in requesting, or responding to a request for, appointment of a guardian ad litem/next friend for a parent because disclosure of the client's disability can adversely affect the client's interests in the proceeding. If a guardian ad litem/next friend is appointed for a parent client, counsel should ensure that the role of the guardian ad litem/next friend is clearly defined by the court.

1.8 Protection of Confidentiality, Privileged Communications, and Attorney Work Product

Consistent with the client's interests and goals, counsel shall seek to protect from disclosure communications and other information concerning the client that are protected by applicable laws of confidentiality and privilege, including attorney work product. Counsel shall explain fully to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality. If counsel for a child determines that the child is unable to make an adequately considered decision with respect to waiver, counsel must act with respect to waiver in a manner consistent with and in furtherance of the client's position in the overall litigation. Counsel may request the appointment of a guardian ad litem for the limited purpose of making decisions regarding waiver.

Commentary: Counsel shall take whatever steps are necessary to protect the client's privileges and right to confidentiality promptly following appointment to the case. Counsel should not wait until the time for filing pre-trial motions to address these matters. Improper disclosure of confidential or privileged information early in the proceeding may color and impact the manner in which the parties, the court investigator, and the court perceive the client, the services offered to the client, and the position taken by the parties. In addition, the underlying purpose of the laws of confidentiality and privilege, to protect an individual's interest in keeping private certain information and certain relationships, is an important goal independent of the effect disclosure would have on the proceeding.

If a child is able to make an adequately considered decision with respect to waiver of a privilege or right to confidentiality, counsel shall advocate the child's position and, if necessary, oppose the appointment of a guardian ad litem to substitute his or her judgment for that of the child. If a guardian ad litem is appointed for a child client, counsel should ensure that the role of the guardian ad litem is clearly defined by the court.

If counsel for a child determines that the child is unable to make an adequately considered decision with respect to waiver, counsel must consider whether to request the appointment of a guardian ad litem for the limited purpose of making a substituted judgment determination with respect to the matter. Counsel should ensure that the guardian ad litem considers only those factors that a competent client would consider. Counsel may wish to ensure that the guardian ad litem consider: (1) the child's expressed preferences, if any; (2) the nature of the communications and the effect on the child of disclosure; and (3) the extent to which disclosure advances or hinders the child's position in the proceeding. Counsel should object to the extent the guardian ad litem considers the need of other parties for the information insofar as the role of the guardian ad litem is to make a substituted judgment determination, not to weigh the relative benefits and harms to the child and other parties.

Counsel must be prepared to respond to any attempt by another party to waive or invoke the client's privilege or right to confidentiality.

1.9 Missing Parent Clients.

In the event a client's whereabouts are unknown, counsel shall take a position in court and administrative proceedings consistent with the client's last clearly articulated position or directive. In the absence of such information, or in the event circumstances have changed materially since the client last articulated a position, whether or not to take action on behalf of such client is a matter left to the discretion of counsel consistent with the Massachusetts Rules of Professional Conduct.

Commentary: The whereabouts of a client may, for any number of reasons, become unknown to counsel. If the client's whereabouts become unknown during the course of a case, counsel should take any actions which are consistent with the last clearly articulated position or directives of the client. In the absence of such information, any action taken on behalf of the client is left to counsel's discretion.

Except as otherwise set forth in Commentary to Standard 2.1, if counsel has never had contact with a client or counsel is unable to contact the client after diligent efforts, counsel may either (a) withdraw from the representation, or (b) take no position in the proceedings but take such actions as counsel deems necessary and appropriate to protect other rights and interests of the client, such as rights to confidentiality and the exercise of privileges. See Standard 7.3.

2. TEMPORARY CUSTODY (INCLUDING 72-HOUR) HEARINGS

2.1 Right to Hearing.

Counsel shall assert and protect the client's right to temporary custody (including 72-hour) hearings.

Commentary: Temporary custody hearings (including the so-called "72-hour hearing") is an event of crucial strategic importance in child welfare cases. Because of the potential for serious ramifications to the parent-child relationships and the safety of the child, due process demands that clients receive diligent, zealous representation of counsel at such hearings. This is true whether the client supports or opposes a transfer of temporary custody. If the parents consent to a temporary order of custody to DSS, and if the child's position is to be placed in the temporary custody of a relative or other individual, counsel for the child should assert the child's right to a temporary custody hearing to present evidence in support of his or her position. See Care and Protection of Manuel, 428 Mass. 527 (1998).

The statute governing probate court orders of temporary custody to DSS does not contain all of the procedural safeguards that are mandated in the juvenile court. In probate court proceedings, counsel should assert the client's right to a temporary custody hearing consistent with due process. A client in

the probate court should receive no less procedural protection than that afforded similarly situated clients in the juvenile court. See Adoption of Donald, 44 Mass. App. Ct. 857 (1998).

Postponement by court: The trial court may, due to scheduling difficulties, inform counsel of the need to postpone a temporary custody or 72-hour hearing. If such a continuance is inconsistent with the client's interests or goals, counsel should object to any such postponement. If necessary, counsel should consider pursuing the client's right to a timely hearing by taking an interlocutory appeal.

Requesting continuances: In some instances, counsel may not receive notification of his or her assignment in time to prepare adequately to represent the client at a temporary custody hearing or to summons witnesses or documents. Should this occur, counsel should advise the client of counsel's need for additional time to prepare and, if the client consents, object to proceeding with the hearing and seek a short continuance, provided that the benefit of a continuance outweighs the prejudice of not going forward. Counsel may also need to request a continuance or reserve the client's right to a hearing if the client is unavailable due to illness or some other reason.

Denial of right to hearing: If the court denies a client his or her right to a temporary custody or 72-hour hearing, and such denial is inconsistent with the client's interests and goals, counsel should consider pursuing the client's right to a hearing by taking an interlocutory appeal.

Presence of client: If a parent client is not present as a consequence of failure of notice by the court or DSS, counsel should object to proceeding without the client and seek to preserve the client's right to a 72-hour hearing. If a client is incarcerated or involuntarily committed, counsel should file a habeas corpus petition seeking transportation of the client to court. If such a petition is impracticable or a habeas order unenforceable (as it may be in cases where the client is incarcerated outside the commonwealth or in the federal system), counsel must file a motion asking the court to accommodate the client's right to participate in the proceedings through closed circuit television, telephone, or by some other means. If a child client wishes to attend a hearing, and such attendance is appropriate given the child's age and abilities and the nature of the proceedings, counsel should assure the child's attendance.

Counsel without direction from client: If counsel is without direction from a client as to his or her goals at the hearing, counsel should seek to protect and preserve the client's due process rights. Counsel should, depending on the circumstances, request a continuance of the hearing or take such other steps as are necessary to preserve the client's right to a temporary custody hearing.

2.2 Preparation for Hearing.

In preparation for the temporary custody (including 72-hour) hearing,

- (a) counsel shall:

(i) conduct an initial interview with his or her client, determine the client's position, advise the client as to the merits of the case, and develop a strategy for preparing for and conducting the hearing;

(ii) discuss with the client his or her right to refuse to give certain testimony under the 5th Amendment of the U.S. Constitution and Article XII of the Massachusetts Declaration of Rights; and

(iii) review all pleadings filed in the case, any reports of suspected abuse or neglect filed pursuant to G.L. c. 119, § 51A or 51B regarding the incident(s) which led DSS to petition the court for legal custody, and all documents to be submitted as evidence at the hearing.

(b) counsel shall, if applicable and to the extent practicable:

(i) review other portions of the client's DSS file, any pleadings filed in other child welfare cases involving the client, and any other relevant records;

(ii) if consistent with the client's interests and goals, identify relatives, family friends, or other persons who are potential placement or custody options, and take such steps as may be necessary to offer such persons to DSS and/or to the court for placement or custody determinations; and

(iii) if consistent with the client's interests and goals, identify and interview potential witnesses, prepare such witnesses for the hearing, and subpoena documents and/or witnesses to appear at court for the hearing.

Commentary: Depending on the client's interests, it may be appropriate to seek a grant of temporary custody by the court to the relative, family friend, or other person identified by the client. This is to be distinguished from a grant of custody to DSS, who can then place the child in foster care with that person. Counsel should advise the client and the placement/custody option on the differences and relative advantages and disadvantages of temporary custody versus foster care, including but not limited to issues such as the authority to make decisions regarding the child's care, eligibility for grantee-relative benefits through the Department of Transitional Assistance and/or foster care payments, eligibility for services offered by DSS, and visitation.

The alternative remedies of a return of custody to the parent and a grant of custody to a relative, family friend, or other identified custody option are not mutually exclusive at the 72-hour hearing. Counsel need not choose between these options, and, if consistent with the client's interests and goals, must be prepared to pursue said alternative remedies at the 72-hour hearing.

2.3 Conduct of Hearing.

To the extent consistent with the client's interests and goals as determined pursuant to these Performance Standards, counsel shall, at the temporary custody (including 72-hour) hearing:

(a) file any and all appropriate motions and legal memoranda, including but not limited to motions regarding (i) placement or custody of children, (ii) visitation, (iii) the assertion of privileges and confidential relationships, and (iv) the admission, exclusion or limitation of evidence;

(b) present and cross examine witnesses, and provide evidence in support of the client's position;

(c) make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and

(d) take any and all other necessary and appropriate actions to advocate for the client's interests and goals.

Commentary: Counsel must also remain cognizant of the provisions of G.L. c. 119, §§ 24 and 29C obligating the DSS to make reasonable efforts, prior to removing a child from the home, to eliminate the need for said removal. If appropriate, counsel should ask the court to certify that DSS failed to make reasonable efforts to prevent removal. Counsel should be aware that such a certification at this stage of the proceeding may bar a child from receiving certain services or subsidies if placed out of state.

3. INVESTIGATION AND DISCOVERY

To develop and support the client's position, counsel shall conduct a thorough and continuing investigation at every stage of the proceeding which is independent of that of any other party to the proceeding and of any court investigator or guardian ad litem appointed by the court.

Commentary: Thorough, thoughtful and independent investigation is necessary for counsel to develop the client's position and a theory of the case, advise the client and identify potential evidence, whether beneficial or detrimental to the client's position.

3.1 Informal Discovery

(a) Meet with Client. Counsel shall meet with the client and obtain from the client information relevant to the proceeding and the client's position.

Commentary: The client is an important and primary source of information regarding the facts of the case, the family and its history. The client may also assist counsel by identifying sources of information and records which may be relevant to the proceeding. Even with very young children, counsel can obtain valuable information from meeting with the child and viewing the child in his or her environment. (See Standard 1.5, Communications with Client) Counsel should maintain an adequate, contemporaneous record of such client interviews.

(b) Review of DSS Records. DSS records are an integral part of the preparation of a case. Counsel shall obtain the entire social services file. These records may be obtained through a formal or informal process.

Commentary: Counsel may be able to obtain the records informally by a written request to the DSS office. However, counsel should also be aware of the Juvenile Court rules and the Code of Massachusetts Regulations regarding discovery. For Probate and Family Court actions, counsel may need to file appropriate requests for production of documents.

While the Juvenile Court Rules do not define what is meant by the “entire” social services file, a review of the DSS Policies and Procedures Manual provides guidance as to the potential documents which will be generated or obtained by DSS when servicing a family. The records received from DSS may not contain the home finder records or any other records on the foster or pre-adoptive home. Counsel may need to file a motion to obtain those records.

(c) Review of Court Records. Counsel shall review court records for the proceeding in which she or he is appointed on an on-going basis. Such review shall include any court investigator, guardian ad litem, family service or probation officer reports.

(d) Other records. Counsel shall review relevant social service, medical, psychiatric, psychological, substance abuse, law enforcement, CORI and school records, as well as records of other court proceedings, as appropriate, and take the necessary steps to obtain such records.

(e) Interviews. Counsel shall contact and interview, where appropriate, those individuals with information concerning the family, such as parents, relatives, caretakers, neighbors, DSS social workers and other social service personnel, school personnel, day care providers, medical providers, treatment providers, former counsel, probation officers, family service officers as well as those individuals who are suggested by the client or identified through investigation or discovery as potential witnesses.

Commentary: Counsel should be mindful of Rule 4.2 of the Massachusetts Rules of Professional Conduct, which prohibits an attorney from communicating about the subject of the representation with a person known to be represented by another attorney in the matter unless the other attorney consents. When the represented “person” is an organization such as DSS, Rule 4.2 only prohibits ex parte contact with those employees: (1) who exercise managerial responsibility in the matter; (2) who are alleged to have committed the wrongful acts at issue in the litigation; or (3) who have authority on behalf of the organization to make decisions about the course of the litigation. Neither the Rule nor case law speaks to whether, or the circumstances under which, counsel may contact DSS social workers or other DSS employees without the consent of DSS counsel. Counsel should consult Rule 4.2, the commentary thereto, and Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 436 Mass. 347 (2002), for guidance on this issue.

(f) Physical Evidence. To the extent practicable, counsel shall view any relevant physical evidence.

(g) Counsel shall contact opposing counsel to gather information about the case and the positions of the other parties.

(h) Counsel should, if appropriate, necessary and practicable, attend all service planning, treatment and placement meetings, administrative reviews and hearings and other proceedings involving the client. In addition, if counsel represents a child, counsel should, if appropriate, necessary and practicable, attend school conferences.

3.2 Formal Discovery.

Counsel shall, if necessary, conduct formal discovery (a) to develop a more formalized record for trial, (b) to obtain in a timely manner the information necessary to develop and support the client's position and/or (c) to understand an opponent's case. At a minimum, counsel's strategy should include consideration of the following types of formal discovery: depositions, interrogatories (including expert interrogatories), requests for production of documents, requests for admissions, and motions for mental or physical examination of a party.

Counsel shall, consistent with the client's interests and goals, and where appropriate, take all necessary steps to preserve and protect the client's rights through opposition to the discovery requests of other parties. This includes, but is not limited to, invoking applicable privileges and rights to confidentiality, raising objections on the basis of relevance, and seeking appropriate limitations on the discovery requested.

Commentary: Counsel should timely file and seek court action on any motions to permit, compel, assist or oppose discovery as required by the applicable court rules or the Indigent Court Costs Act. In addition, counsel may deem it appropriate to seek sanctions for a party's failure to comply with discovery requests or orders.

4. SEEKING CLIENT OBJECTIVES

4.1 Obtaining Services for the Client and His or Her Family.

Consistent with the client's interests and goals, counsel shall request that DSS provide appropriate services in a timely manner to the client and/or members of his or her family. The attorney shall negotiate with DSS for the development of a service plan that meets the client's interests and needs and advances the client's goals in the litigation. In the event that DSS' proposed service plan does not meet the interests or needs of the client, counsel may, as appropriate, challenge the service plan through available administrative and judicial means. As necessary, counsel should investigate the availability of services or benefits provided by other public or private agencies or organizations and seek such services for the client.

Commentary: Counsel should make an independent determination of what services are necessary to meet the client's needs and to advance the client's interests in the litigation. Counsel should consider any barriers to the client's use of available services including disabilities or transportation, language or cultural barriers and seek to overcome such barriers.

Services may include: family preservation-related prevention or reunification services; sibling and family visitation; domestic violence prevention, intervention and treatment; medical care; mental health services; substance abuse treatment; parent and home health aides; parenting education; respite services; independent living services; specialized or long-term foster care; adoption services; education; recreational or social services; housing; financial assistance; vocational or employment-related services.

Counsel may advocate that services be provided to the client, to another family member, or to the child's substitute caretaker. For example, where the child supports reunification, child's counsel may advocate that the parent receive particular services necessary to enable the parent to care properly for the child. Alternatively, parents' counsel may advocate for the child to receive particular services necessary to permit the child to return home.

Counsel should be aware that the DSS regulations require that, to the greatest extent possible, the service plan be developed jointly with the family. It is important that counsel actively participate in service planning for the client.

Where counsel represents a child for whom the permanent plan is guardianship or adoption, counsel should seek to ensure, prior to the adoption or guardianship finalization, that the child and permanent caretakers will receive all necessary and appropriate post-guardianship or post-adoption services and subsidies for which they may be eligible.

4.2 Visitation.

At each stage of the proceeding, counsel shall assert the client's rights to, or interests in, parent-child, sibling or other visitation.

4.3 Custody and Placement.

At each stage of the proceeding, counsel shall zealously advocate for placement or custodial options consistent with the client's goals and objectives, and should be prepared to present placement alternatives with family members or friends.

4.4 Communicating with the Court Investigator/Guardian ad Litem.

(a) Counsel shall contact the court investigator/guardian ad litem as soon as practicable to inform him or her of the attorney's role and of the client's position.

(b) Counsel shall, if appropriate, revoke all authorizations for the release of confidential information and oppose motions seeking access to such information.

(c) Counsel shall inform the client of the role of the court investigator/guardian ad litem, including the consequences of cooperating or failing to cooperate with the court investigator/guardian ad litem, and prepare the client for the interview.

(d) Counsel shall be present at any interviews of the client by the court investigator/guardian ad litem, unless there are compelling reasons why counsel's presence would be unnecessary.

(e) Counsel shall assist the court investigator/guardian ad litem in obtaining information that supports the client's position.

Commentary: Counsel's presence at the court investigator's or guardian ad litem's interview with the client not only provides support for the client but ensures that the client has the opportunity to fully answer all questions and to present information, including the names of other persons to be interviewed, that is helpful to the client's case. Counsel's presence can be invaluable in preparing future cross examination of the interviewer. It also permits counsel, where appropriate, to advise the client not to answer specific questions posed by the interviewer or not to sign releases in the form submitted.

Many of the standards herein may apply as well to evaluations by other persons evaluating or interviewing the client, such as court appointed special advocates (CASAs), court clinicians, family service officers or probation officers.

4.5 Filing Pleadings.

Prior to trial, counsel shall, as necessary, file petitions, motions, responses or objections to protect the client's rights and interests and to advance the client's position in the case. Relief requested may include, inter alia, temporary custody orders; orders concerning visitation; rulings that DSS has abused its discretion; court-ordered evaluations; funds for experts or other services necessary for representation permitted under the Indigent Court Costs Act; restraining orders; contempt for non-compliance with a court order; protective orders concerning the client's privileges and right to confidentiality; appointment of guardians ad litem; or dismissal of petitions or motions.

4.6 Interlocutory Appeals

(a) Petition to Single Justice. Trial counsel shall, where appropriate, seek interlocutory relief from an order of the trial court by filing a petition to a single justice or through other appellate means. Counsel shall provide CAFL administrative staff with a copy of the petition and any supporting memoranda.

Commentary: As a general rule CPCS does not assign certified appellate counsel to represent clients in interlocutory matters before the single justice sessions of the appellate courts, and trial counsel remains responsible for such representation. Regional Coordinators and CAFL staff are available to provide advice on interlocutory matters on a case by case basis. In certain circumstances, CAFL staff

may be able to assign a mentor to counsel to assist with the filing of the petition or even assign certified appellate counsel.

(b) Appeal of Single Justice Order. Trial counsel shall, where appropriate, appeal an adverse order by the single justice to the full appellate court. In the event counsel elects to appeal an order of a single justice, or if the single justice reports his or her decision to the full appellate court, counsel shall promptly (i) contact CAFL for the assignment of certified appellate counsel to work on the appeal, and (ii) provide CAFL with copies of all papers filed in the appellate court that were not already provided under section (a) above.

4.7 Experts

(a) Counsel shall retain an expert where reasonably necessary to assist counsel in preparing or presenting the case.

(b) If counsel determines that expert assistance is necessary, counsel shall file a motion under the Indigent Court Costs Act to obtain the necessary funds for hiring an expert. If the motion is denied in whole or in part, counsel shall consider filing a notice of appeal in accordance with G.L. c. 261, § 27D.

(c) Counsel shall protect the confidentiality of all expert-related information including as necessary: filing motions for costs on an ex parte basis; requesting impoundment of the motion for costs; and informing the expert about the attorney-client privilege and attorney work-product protection.

Commentary: Otherwise discoverable documents enjoy a qualified immunity from discovery if they are attorney work product pursuant to Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure. Work by an expert retained by counsel is similarly protected. Counsel should take steps to safeguard the expert's work product, including filing the motion for costs ex parte and seeking impoundment of the motion. Counsel should send the expert an engagement letter that explains the expert's role in assisting counsel, and directs the expert to speak to no one about his or her work without counsel's permission. In the event counsel makes a strategic decision to share the results of the expert's work, counsel should convey such results him- or herself; counsel should not allow another attorney to speak to directly to the expert. If counsel fails to take adequate precautions, he or she may inadvertently waive the work product protection. See Adoption of Sherry, 435 Mass. 331 (2001).

(d) Counsel shall be familiar with the foundational requirements for the admission of expert testimony.

Commentary: Counsel may hire a "testimonial expert" to provide testimony in a hearing or trial, or a "preparatory expert" to provide assistance to counsel in preparing the case. The need for expert assistance should be considered throughout the case, for example at the temporary custody hearing, an abuse of discretion hearing, trial or permanency hearing. More than one expert may be needed in a particular case.

For testimonial experts, adequate preparation is essential. Adequate preparation is also essential if counsel is opposing admission of expert testimony. Counsel should be aware that expert opinion comes not just from hired experts. Fact witnesses, such as social workers, guardians ad litem, court investigators and treatment providers may also offer expert opinion. Counsel should be prepared to satisfy or challenge the foundational requirements of such opinions.

5. PERMANENCY HEARINGS

Counsel shall assert and protect the client's right to a hearing on the permanency plan for th

5.1 Right to Hearing

e child.

Commentary: The court may choose to conduct a permanency hearing in conjunction with an adjudicatory hearing on the merits of the petition. Counsel should object if this is prejudicial to the client. Counsel should zealously advocate for the client in the permanency hearing in addition to any obligation he or she may have in the adjudicatory hearing.

In the event that the court denies or improperly limits the client's right to a permanency hearing, counsel should consider pursuit of any available avenues for relief, including but not limited to interlocutory appeal, or appeal under G.L. c. 119, § 29B. Counsel should ensure that the appellate record is preserved by making detailed and specific offers of proof through, among other methods, affidavits or oral or written proffers.

5.2 Preparation for Hearing

In preparation for the permanency hearing, consistent with the client's interests and goals, counsel shall:

- (a) obtain and review the permanency plan for the child filed by the petitioner, and determine the extent to which the plan is consistent with the client's position;
- (b) if the proposed plan is inconsistent with the client's position, file a timely objection;
- (c) conduct any necessary discovery;
- (d) determine what evidence to present;
- (e) prepare for the direct and cross examinations of witnesses; and
- (f) take all necessary and appropriate steps to ensure the availability and presentation of evidence at the hearing, including but not limited to the issuance of

subpoenas and the filing of motions.

Commentary: Counsel should be familiar with Trial Court Rule VI, Uniform Rules for Permanency Hearings. Counsel should seek a continuance of the permanency hearing when the petitioner has not complied with Trial Court Rule VI, unless a continuance is inconsistent with the client's position.

5.3 Conduct of Hearing

During the hearing, counsel shall act as a zealous advocate. To the extent consistent with the client's interests and goals, counsel shall:

- (a) file all appropriate written objections, motions, and/or legal memoranda;
- (b) present and cross examine witnesses;
- (c) make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal;
- (d) consistent with the client's goals, advocate for a finding as to reasonable efforts; and
- (e) prepare requested findings of fact, conclusions of law, and proposed orders.

Commentary: Because the issues to be litigated at a permanency hearing often overlap with those to be litigated at a trial, the court may be inclined to limit the scope of the evidence to be presented at the permanency hearing. Consistent with the client's position, counsel should object to any limitations placed on the client's ability to present evidence.

There may be situations in which it is strategically advantageous to not fully litigate at the permanency hearing. Counsel must consider whether it better serves the client's interests to wait until the trial or other stage of the proceeding to present and/or object to evidence.

Where appropriate, counsel should seek to secure specific orders at the permanency hearing, as a means for expediting permanency for the child.

For guidance regarding the client's participation at the permanency hearing, see Standards 1.9, 2.1 and 6.1(h) and commentary thereto, concerning the presence of the client and the client's direction to counsel.

5.4 Appeal

If the client wishes to appeal the permanency hearing decision, counsel shall file a timely appeal and follow the rules set forth in Standard 8.1.

6. TRIAL PREPARATION AND CONDUCT

6.1 Trial Preparation

Counsel shall take all necessary and appropriate steps to fully prepare, defend and present the client's position at trial.

Commentary: In order to effectively prepare and defend the client's case, counsel should have a theory of the case, i.e., a cogent statement of a position that justifies the outcome. Throughout trial preparation, counsel needs to consider the theory of the case and how each piece of evidence affects the theory.

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(a) Pretrial motions. Counsel shall prepare and file pretrial motions that advance the client's interests and seek to have such motions heard expeditiously by the court.

Commentary: Counsel should consider the full range of pre-trial motions available to advance the client's position at trial. Such motions may include, inter alia, discovery motions; motions in limine to exclude evidence; motions to strike; motions for speedy trial and consecutive days of trial; motions for visitation; motions to bifurcate proceedings; and motions for stenographic record and for the allowance of funds pursuant to the Indigent Court Costs Act, G.L. c. 261, §§ 27A-G.

(b) Counsel shall determine what evidence will be submitted to the court.

Commentary: Counsel shall identify all lay and expert witnesses as well as all documentary, demonstrative and physical evidence that he or she will seek to introduce into evidence in the client's behalf. In addition, counsel shall be prepared, when necessary, to cross-examine all witnesses called by other parties and object to, or file appropriate limiting motions as to, documentary evidence proffered by other counsel.

(c) Pretrial conference. Counsel shall notify the client of the pretrial conference date in writing and shall prepare for the pretrial conference. Counsel shall seek to discuss with other counsel and/or pro se litigants contested and uncontested facts and issues. Such preparation may also include the drafting and filing of motions in limine and pretrial memoranda in accordance with the pretrial orders, rules or practices of the court.

Commentary: The purpose of the pretrial conference is to determine contested and uncontested facts, simplify issues for trial, explore settlement opportunities and to estimate accurately the necessary trial time for the court.

Counsel should request that the court establish a deadline for outstanding discovery requests and the exchange of final witness and exhibit lists prior to trial. Counsel may also consider seeking

consecutive trial dates or the sequestration of witnesses. Counsel should endeavor to take all steps to advance the client's position including, where possible entering into stipulations of uncontested facts or stipulations to testimony.

Counsel should be aware that Juvenile Court Rule 8 requires counsel to submit any motions in limine relative to the court investigator's report at the time of the pretrial conference. Failure to submit such motion in accordance with the rules may prohibit counsel from submitting it at a later date, thereby precluding counsel from objecting to such evidence.

(d) Scheduling of Trial. Where consistent with the client's interests, counsel shall take all steps necessary to assert the client's right to a prompt trial, which may include objecting to continuances or moving for protective orders, sequential trial dates, or for a speedy trial.

Commentary: There are a number of issues that can result in trial delays, such as the need for a foreign language or sign language interpreter, stenographer, or audio-visual equipment to permit an incarcerated client to participate in the proceedings. Counsel must consider these issues in his or her trial preparation.

(e) Counsel shall take all necessary and appropriate steps to assure the availability and submission of evidence at trial.

Commentary: Counsel should provide written notification of the trial date to the client and all witnesses. Counsel should determine the availability and willingness of witnesses to appear and testify at trial. If witnesses are unavailable on the date that the trial is scheduled, counsel should consider the necessity of seeking a continuance of the trial if the testimony is crucial to the client's position or, in the alternative, explore other methods of introducing the testimony into evidence. If the appearance of a witness or party necessitates the issuance of a subpoena or writ of habeas corpus, counsel should seek the issuance of such process and take steps to assure the payment of any fees associated with such process.

Counsel should take all necessary action to assure that documentary evidence is available for introduction into evidence. Counsel should consider utilizing various statutory remedies, including the issuance of subpoenas duces tecum in this regard. In conjunction with all counsel, counsel should consider preparing an exhibit book containing stipulated and contested documentary evidence for the convenience and benefit of the court.

Counsel should consider assembling a trial notebook which contains, inter alia, witness testimony, exhibits, pretrial orders, pleadings, evidentiary memoranda, statutory and decisional law, timeline, genogram, family history, etc. to assist counsel's organization during trial. Counsel shall, as appropriate or where requested by the court, prepare evidentiary memoranda, requests for rulings and findings of fact and rulings of law consistent with the client's position and the anticipated evidence.

(f) Preparation of witnesses. Counsel shall prepare his or her own witnesses for direct and cross examination in advance of trial.

(g) Participation of parent client: Counsel shall fully prepare the parent client to testify and shall discuss with him or her the desirability of the client testifying at trial and the adverse inferences which may be drawn by the court in the event that a parent client does not testify. Further, counsel shall advise the parent client that an opposing party may call the parent client as a witness. Counsel shall discuss with the parent client his or her right to refuse to give certain testimony under the 5th Amendment of the U.S. Constitution and Article XII of the Massachusetts Declaration of Rights.

Commentary: The parent client's testimony can be the most helpful or damaging evidence to the client's case, depending on preparation. Such preparation should include multiple meetings with the client to explain the testimonial process and to participate in mock direct and cross-examinations of the client.

If the parent client is incarcerated counsel must visit the client to ensure proper preparation. Counsel shall seek to ensure an incarcerated client's presence at trial by petition for habeas corpus. If the client's presence cannot be secured, counsel shall seek to preserve the client's right to participate in the proceedings by filing a motion for some other form of accommodation such as closed circuit television or telephone. See also Standard 2.1 Commentary.

(h) Participation of child client: Counsel for a child client should accommodate the expressed wishes of a competent child client to be present during trial. In determining whether to call the child client as a witness, counsel shall consider the child's competency to testify, the need for the testimony, the harm that such testimony may cause the child and the child's expressed wishes. Counsel shall prepare the child to testify and seek appropriate accommodation for the child from the court to minimize any anticipated trauma. Where appropriate, counsel shall oppose the efforts of other parties to call the child as a witness.

Commentary: Counsel should prepare the child in an age appropriate manner to testify at trial. Counsel may wish to consult persons familiar with the child or retain an expert to assist in such preparation.

If the child does not wish to testify, but counsel determines that the child's testimony would further the child's position, counsel should explore whether there are alternative means for the court to admit any statements of the child which may be relevant to the proceeding, such as exceptions to the hearsay rule or the inclusion of such statements in any report of the court investigator and/or guardian ad litem. In addition, counsel should examine whether evidence which the child might give the court is available from other witnesses.

If the child does not wish to testify, but is subpoenaed to testify, and testifying could be harmful to the child, counsel should seek to quash the subpoena through the presentation of evidence as to said harm to the child. Alternatively, counsel should determine if the evidence can be admitted through any of the other means described in the preceding paragraph.

If the child must testify, counsel should seek to minimize any harm to the child by requesting special accommodations for the child's testimony, such as altering the location of the testimony, allowing the child to testify informally and in a developmentally sensitive manner outside the presence of other parties to the proceeding, using leading questions, or limiting the scope of cross examination. See Adoption of Ronj, 56 Mass. App. Ct. 52 (2002).

The child may wish to be present during trial. While counsel should assure that the child is brought to court, he or she should also counsel the child that the judge may nevertheless exclude the child from the courtroom in an effort to shield the child from potential trauma.

6.2 Trial Conduct.

During trial, counsel shall act as a zealous advocate for the client by ensuring that proper procedures are followed and that the client's interests are represented. To the extent consistent with the client's interests and goals, counsel shall:

- (a) File all appropriate motions and legal memoranda, which may include motions regarding (i) post-termination and/or post-adoption contact, (ii) sibling visitation, (iii) the assertion of privileges and confidential relationships, (iv) the admission, exclusion or limitation of evidence to be presented, i.e., motions in limine; or (v) the sequestration of witnesses;
- (b) Present and cross examine witnesses and provide evidence in support of the client's position;
- (c) Make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and
- (d) Prepare proposed findings of fact and conclusions of law.

Commentary: Although a client's position may be consistent with that of another party, counsel for that client remains responsible for presenting evidence and witnesses. Counsel should also make all necessary evidentiary objections, because an objection by one attorney to evidence or testimony protects only that attorney's client.

Proposed findings and conclusions are a crucial opportunity to marshal evidence supporting the client's position. They may also help to preserve issues for appeal. Proposed findings of fact must reference the evidentiary source(s). The Supreme Judicial Court has issued guidelines for proposed findings for these cases that are available on the CPCS website.

7. SETTLEMENT

Counsel should participate in settlement negotiations to seek the best result possible for the client consistent with the client's interests and directions to counsel. Counsel should consider utilizing available settlement resources, including mediation, to narrow contested issues or reach global

resolution. Prior to entering into any negotiations, counsel shall have sufficient knowledge of the strengths and weaknesses of the client's case, or of the issue under negotiation, to enable counsel to advise the client of the risks and benefits of settlement.

Commentary: From the time of appointment, and at every stage of the proceeding, counsel should be aware of the possibility of settlement opportunity and should discuss such opportunity with the client. Counsel should, consistent with the client's interests and direction, and at strategically appropriate times, proffer and respond to settlement offers without compromising the client's position in the proceeding. Counsel should participate in the settlement process for or with the client to the extent that the client wishes or that it is advisable to protect the client's interests. Counsel must, however, continue to move the litigation forward for the benefit of the client in the event that settlement fails.

Counsel for a child client should keep in mind that a negotiated resolution of these proceedings often serves the child's needs for finality, security and family contact, and should encourage settlement whenever such resolution is consistent with the child's interests and goals.

8. POST-JUDGMENT REPRESENTATION

Counsel shall inform the client of the court's decision and act in accordance with Standard I.5. Counsel shall discuss with the client his or her post-judgment and appellate options regarding an adverse decision from the court. Counsel shall continue to represent the client in accordance with Standard 1.3.

Commentary: A child's position may change after trial. It is critical for child's counsel to inform the child of the court's decision and determine whether the child's position requires counsel to challenge all or part of the judgment.

8.1 Appeals.

(a) If the client elects to appeal, counsel shall file a timely appeal, order cassettes or transcripts or ensure that they have been ordered and seek assignment of CAFL appellate counsel in accordance with the Rules of Appellate Procedure. For parent clients, counsel shall take such steps as are necessary to obtain the client's signature on the notice of appeal. If appropriate, counsel shall also request a stay of the judgment pending appeal. Counsel for the appellee shall monitor appellant's compliance with appellate deadlines.

(b) Counsel shall submit necessary documentation to CAFL for the assignment of appellate counsel immediately upon the filing of the appeal, even if counsel is appellate certified. If counsel is appellate certified and wishes to keep a case on appeal, counsel must seek the permission of CAFL administrative staff.

(c) Counsel shall represent the client on all appellate matters until appellate counsel files an appearance.

(d) Counsel shall cooperate with the client's appellate counsel and provide appellate counsel with copies of exhibits, motions, and other pleadings. Counsel shall provide appellate counsel with other papers, including the case file and/or trial notes, upon request.

8.2 Post-Judgment Hearings, Reviews and Motions.

Following issuance of the judgment, counsel shall continue to represent the client in accordance with Standards 1.3 and 1.5. Counsel shall also continue to represent the client (except for parents where parental rights have been terminated) at all appropriate administrative and foster care reviews. Where appellate counsel has been assigned, trial counsel shall notify appellate counsel of any activity in the trial court and any other significant event.

Commentary: Counsel continues to represent the client in the trial court when an appeal is taken. Counsel should not withdraw from the case just because an appeal is filed. After the appeal has been docketed in the Appeals Court, trial counsel may not file certain pleadings in the trial court which seek to affect the

judgment absent leave of the appellate court. Counsel should notify appellate counsel of the need to proceed in the trial court and request that appellate counsel seek the appropriate leave of court.

8.3 Cessation of Representation

(a) Conclusion of case. In the event the case concludes by the occurrence of one of the events described in Standard 1.3(a) above, counsel shall notify the client and explain the meaning and ramifications of case conclusion.

(b) Withdrawal from case. In the event counsel seeks to withdraw from a case, counsel shall move the court for successor counsel for the client. Counsel shall provide the client with a copy of the motion to withdraw and notice of the hearing. Counsel shall, to the extent practicable, avoid disclosing confidential information and information adverse to the client in any motion to withdraw or hearing thereon. If successor counsel is named, counsel shall cooperate with successor counsel. In the event the court determines not to appoint successor counsel, counsel should advise the court and opposing counsel of the client's address, unless otherwise directed by the client.

Commentary: In situations where counsel is withdrawing at the client's request, counsel should advise the client that the court may decline to appoint substitute counsel unless the client can demonstrate good cause. See Adoption of Olivia, 53 Mass. App. Ct. 670, 673-675 (2001).

It is very important that pro se clients receive the same pleadings and notices as are served on counsel. If counsel is withdrawing from a case involving domestic violence or presenting other safety concerns for the client, counsel may not wish to disclose the client's address to other counsel or other pro se litigants. In such circumstances, counsel should, contemporaneously with the motion to withdraw and (if possible) after discussion with the client, (a) file a motion to impound the client's address and (b), unless the client provides the court with the completed appointment of agent form, ask the court and remaining counsel to provide the client with notices of any hearings scheduled and copies of any pleadings filed or orders entered.

(c) Striking counsel's appearance. In the event the court strikes counsel's appearance and no successor counsel is appointed, counsel should advise the court and opposing counsel of the client's address, unless otherwise directed by the client.

Commentary: Counsel should follow the commentary set forth in Standard 8.3(b) above.

PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CLIENTS IN CHILD WELFARE APPEALS

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

Appellate counsel in child welfare appeals are bound by the within Performance Standards and also by all applicable Performance Standards Governing Representation of Children and Parents in Child Welfare Cases (Trial Standards) as set forth in the CPCS Assigned Counsel Manual (1999), which are fully incorporated herein.

Compliance with Massachusetts Rules of Appellate Procedure. Appellate counsel shall comply in all respects with the Massachusetts Rules of Appellate Procedure.

Work with a Mentor. Appellate counsel assigned to work with a mentor shall work with such mentor as required by the CAFL Co-Director overseeing the appellate panel. Appellate counsel shall abide by the terms and conditions of the mentor program as may, from time to time, be issued by such CAFL Co-Director.

Initial Obligations of Appellate Counsel. Immediately upon receipt of the notice of assignment, appellate counsel shall: (a) file an appearance in the appropriate court; (b) communicate with the client, if appropriate for the client's age, to inform the client of the assignment; (c) communicate with trial counsel to inform him or her of the assignment, provide him or her with copies of appellate counsel's appearance and request information and materials necessary for the appeal; and (d) determine whether a stay of the judgment or decree of the trial court should be sought pending appeal. In the event a stay should be sought, counsel shall immediately seek one in accordance with Mass. R. App. P. 6.

Initial Meeting with Client. Appellate counsel shall, as soon as practicable after the assignment, meet with the client. At such initial meeting, appellate counsel shall determine the client's position and goals in the appeal. Appellate counsel is not bound by the determinations of the client's position and goals made by trial counsel. Appellate counsel shall independently determine his or her client's position and goals on appeal as set forth in Trial Standards 1.6 and 1.7, and should be aware of the potential for conflicts as set forth in Trial Standard 1.4.

Ongoing Communications with Client. Appellate counsel shall confer with the client, if appropriate for the client's age, and with trial counsel, if appropriate, about the issues that may be raised in the client's appeal. Appellate counsel shall keep the client informed of all significant developments in the client's case. Appellate counsel shall respond in a timely manner to all communications from the client, provided that such communications are of a reasonable volume and at reasonable intervals. Where the client is a child, appellate counsel shall communicate with the child to the extent necessary to maintain a normal attorney-client relationship with the child. See Trial Standards 1.5 and 1.6.

Communications with Trial Counsel. Appellate counsel shall inform the client's trial counsel of all significant developments in the case, including proposed settlement of the case, trial motions (as set forth in section 7 below), dismissal of the appeal, docketing of the appeal in the appellate court and the resolution of the appeal. Appellate counsel shall cooperate with trial counsel in furtherance of the client's position and goals in the proceeding. See Trial Standard 7.1(d).

Motions. Appellate counsel shall timely file in the appropriate court all motions necessary or advisable to preserve and perfect the client's appellate rights. Appellate counsel who are not assigned to represent the client in the trial court shall not engage in motion practice in the trial court unless such motion practice relates to assembly of the record on appeal, a stay pending appeal, dismissal of an appeal, or a request for new trial or relief from judgment. Appellate counsel may, with prior authorization from the CAFL Co-Director, file and argue other motions.

Issues on Appeal. Appellate counsel should pursue all appropriate issues for appeal. Appellate counsel should pay particular attention to whether a claim as to ineffective assistance of trial counsel may form the basis of an appeal. If the client insists on having appellate counsel brief a contention that, in the judgment of appellate counsel, cannot be supported by a rational argument, appellate counsel shall (a) immediately inform and consult with the CAFL Co-Director and, if the Co-Director concurs, (b) inform the client of the client's rights with respect to such contention pursuant to *Commonwealth v. Moffett*, 383 Mass. 201, 203-09 (1981); (c) provide the client with a copy of the *Moffett* opinion; and (d) if the client thereafter wishes to invoke his or her *Moffett* rights with respect to such contention, comply in all respects with the guidelines set forth in *Moffett*. See *Care and Protection of Valerie*, 403 Mass. 317 (1988).

Briefs. Appellate counsel, whether representing an appellant or appellee, shall file a brief on behalf of his or her client. The brief of appellate counsel shall be of high quality and shall conform in all respects with the applicable Rules of the Massachusetts Rules of Appellate Procedure. Appellate counsel may join in the brief of another party, in part or in full, to the extent the client and such other party have an identity of issues on appeal; provided, however, that appellate counsel shall be responsible for ensuring the timely filing of any brief in which counsel has joined.

Copy of Brief to Client and Co-Director. Appellate counsel shall transmit to the client, if appropriate for the client's age, and the CAFL Co-Director a copy of the brief filed on the client's behalf. Appellate counsel shall also transmit to the client, if appropriate for the client's age, a copy of the brief(s) of other parties and copies of all other substantive documents pertaining to the appellate proceedings.

Oral Argument. Appellate counsel shall inform the client, if appropriate for the client's age, and CAFL Co-Director of the date, time and place scheduled for oral argument of the appeal as soon as the appellate counsel receives notice thereof from the appellate court. Oral argument of the appeal on behalf of the client shall not, absent the express approval of the client and the CAFL Co-Director, be waived with respect to any case.

Decision of Appellate Court. Appellate counsel shall promptly inform the client, if appropriate for the client's age, of the decision of the appellate court in the client's case and shall transmit to the client, if appropriate for the client's age, and the CAFL Co-Director a copy of the decision.

Further Appellate Review. If the decision of the Appeals Court is adverse to the client, appellate counsel shall promptly inform the client, if appropriate for the client's age, of his or her right to make application to

the Supreme Judicial Court for further appellate review of the case. If the client requests that such application be made, appellate counsel shall prepare and timely file on the client's behalf such application.

Federal Appellate Review. Appellate counsel must obtain the approval of the client and the CPCS Chief Counsel before seeking appellate review in the federal appellate courts. Whether or not to seek the approval of the Chief Counsel for federal appellate review is reserved to counsel's discretion. Approval of the Chief Counsel is subject to his or her discretion.

Conclusion of Representation. Appellate counsel's representation of the client ends as of the earlier of (a) withdrawal of the appeal, (b) dismissal of the appeal, absent appeal from such dismissal, (c) entry of an order striking appellate counsel's appearance, absent appeal from such order, or (d) final resolution of the appeal, including remand for a new trial. The CAFL Co-Director may, at his or her discretion, subsequently re-open a Notice of Assignment of Counsel that has been closed pursuant to this section.

**PERFORMANCE STANDARDS GOVERNING
MINORS SEEKING JUDICIAL CONSENT FOR ABORTION
M.G.L. ch.112. sec.12S**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

These standards describe the steps which should be taken by an attorney assigned to represent a minor petitioning for authorization for an abortion pursuant to M.G.L. c.112, sec.12S. They must be utilized in association with the training manual prepared by the Judicial Consent for Minors Lawyer Referral Panel and the Committee for Public Counsel Services and the required training program, which describe in detail the law and procedure governing hearings under this statute.

1. The role of the attorney in a Massachusetts G.L. c.112, sec.12S hearing is to act as legal counsel for the minor petitioner in seeking approval of the petition, and to insure the petitioner is afforded all her due process, privacy and other rights.
2. Immediately upon request to represent a petitioner, the attorney shall make any arrangements necessary to communicate with or to allow the client to communicate with him/her, including leaving with the person assigning the case and with the attorney's office staff, if any, directions on how and when the attorney can be best reached. The attorney shall also determine the earliest practicable time when a hearing may take place, taking into account all information supplied by the person assigning the case as to the client's availability for said hearing. If the attorney's own schedule does not permit her/him to promptly handle the matter the attorney shall decline to represent the petitioner. In all cases the attorney shall notify the referring agency of her/his inability to handle the matter as soon as possible.
3. The attorney should make all efforts to communicate with the petitioner as soon as possible, but at least within forty-eight (48) hours of accepting the case. The attorney must carefully follow any instructions given by the person or agency referring the case as to how to safely contact the petitioner (i.e. times to call, whether or not to leave any message). In the majority of cases, the attorney may not be able to initiate contact with the client, and must therefore make all efforts to be available when the client initiates communication, including leaving with the person or agency assigning the case and with the attorney's office staff, if any, directions on how and when the attorney can best be reached; giving permission for office staff to accept collect calls; and providing alternative methods by which

the attorney could be reached, including cell phone numbers, and, if the attorney is willing, home telephone numbers.

If the attorney is unable to contact the petitioner or is not contacted by the petitioner within forty-eight (48) hours of accepting the case, the attorney must contact the person or agency who referred the case to determine if there has been any further contact by the petitioner and/or if there is any new information concerning how to contact the petitioner.

4. At the initial consultation, which initiates the lawyer-client relationship, the attorney shall:
 - a. explain the M.G.L. c.112, sec. 12S (judicial consent law) and legal procedures to the client,
 - b. determine the reasons for seeking judicial consent,
 - c. determine those factors which indicate or illuminate the minor's maturity and/or the minor's best interest,
 - d. determine how the client knows of her pregnancy and what the length of her pregnancy is, and
 - e. determine the client's understanding of the nature of the legal proceeding and medical proceeding.
5. If a hearing has not been scheduled at the time of the initial contact, or if the petitioner cannot attend the scheduled hearing, the attorney should immediately reschedule the hearing, preferably while the client is still immediately accessible. Should the attorney be unable to obtain a hearing within seventy-two (72) hours (other than by request of the client) the attorney shall contact the Office of the Chief Justice of the Superior Court to make arrangements for a hearing.
6. The attorney shall thoroughly investigate the relevant facts through a complete discussion with the client. Contact with any other person should be made only at the request of or with the permission of the client.
7. The attorney shall make certain that the client is aware of the exact location of the court where the hearing is to be held, and the exact place that the attorney and client will meet, giving directions, if needed. If there is any question as to the client's understanding of either location, the attorney shall request that the client describe to the attorney her understanding of the location. The attorney shall make sure that s/he and the client have appropriate information so that they can identify one another. The attorney shall also make certain the client has some form of transportation to the court.

8. The attorney shall determine from the clerk assigning the hearing whether any particular information or documents are required by the judge for the hearing (e.g., written pregnancy test results, ultrasound) and shall take all steps necessary to obtain the information.
9. The attorney shall determine that the client has received appropriate counseling as to the relevant abortion procedures and risks. If the attorney feels that the client has not received this counseling s/he shall provide the client with information on where such counseling can be obtained.
10. At or before the hearing the attorney shall prepare the necessary court papers and take all steps to insure the client's privacy.
11. At all times the attorney shall do everything necessary to protect the confidentiality of the client.
12. At the hearing the attorney shall act as a zealous advocate for the client, insuring that the proper procedures are followed and that all information concerning maturity, and if necessary, best interest, is placed on the record.
13. After the hearing the attorney shall make sure the client has all necessary papers so that an abortion can be performed and that the client knows how to contact the attorney if any problems arise.
14. Should the petition be denied the attorney shall immediately file a notice of appeal and take all steps to expedite an appeal within forty-eight (48) hours. The attorney shall also, in any case, immediately contact a member of the Judicial Consent for Minors Lawyer Referral Panel steering committee.
15. If an attorney has accepted a case but cannot attend the hearing because of illness or other serious problems, the attorney shall be responsible for obtaining appropriate substitute counsel trained to represent clients in these cases, appraising substitute counsel of all necessary information and, if possible, contacting the client with this information. If the attorney is unable to obtain such counsel on his/her own, s/he shall immediately contact the person or agency who referred the case to arrange for such qualified substitute counsel. If this cannot be done because of time constraints or evening hours, counsel shall contact one of the attorneys listed in the front of the Judicial Consent For Minors Training Manual to arrange for appropriate substitute counsel. At no time is it appropriate for the attorney to inform the client that it is her responsibility to arrange for substitute counsel.

**Committee for Public Counsel Services
Assigned Counsel Manual
Policies and Procedures**

V. Policies and Procedures Governing Billing and Compensation

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1. Compensation

The attorney shall not accept any compensation or other consideration for assigned representation except through the Committee for Public Counsel Services. This rule applies to both indigent cases and marginally indigent cases.

2. Publication of Policies of the Committee for Public Counsel Services

All attorneys receiving case assignments through the Committee for Public Counsel Services must regularly review the CPCS website, www.mass.gov/cpcs, for updates of CPCS policies, procedures, and guidelines. New and revised policies are posted on the website continuously. Notice of new and revised policies and procedures are also posted periodically on E-Bill.

All attorneys receiving case assignments through CPCS will receive the CPCS Criminal Training Bulletin and/or the Children and Family Law Newsletter. Attorneys are expected to apprise themselves of all CPCS rules and policies published in this Manual, in the Training Bulletin and CAFL Newsletter, and on the CPCS website, www.mass.gov/cpcs. Attorneys are also responsible for apprising themselves of the information contained in notices posted on E-Bill.

3. Prohibition Against Being Privately Retained On The Previously Assigned Case

The attorney may **not** be privately retained in a case in which s/he was previously assigned. The purpose of this rule is to prevent the appearance of impropriety, conflict of interest, solicitation, or fraud upon the court.

A. Exceptions to this general rule are outlined below:

1. Non-Indigent Client - Bail-Only Assignment

If the client was originally found to be **not** indigent, but counsel was nevertheless assigned by the court at arraignment for bail purposes only, then the attorney may be privately retained by the client at the request of the client.

In such cases, the attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client continues to request to retain the attorney privately on the case, the attorney shall obtain a written informed consent signed by the client, stating the client's understanding of his/her right to seek other counsel for the private case.

2. Originally Indigent Client - Intervening Determination of Non-Indigency

If the client was originally found indigent and the attorney was assigned by the court, but during the course of the representation, the court makes a **subsequent** determination that the client is **not** indigent, then the attorney may be privately retained by the client at that time, at the request of the client; **provided, however, in proceedings pursuant to G.L. c. 111, §§ 94C and 94G; c. 123; c. 123A; and c. 201**, where a subsequent determination that the client is not indigent is made **prior to the commencement of a hearing**, the attorney may be privately retained by the client at the client's request, unless the court directs the attorney to continue to represent the client at public expense; and provided further, that where a subsequent determination that the client is not indigent is made **after the commencement of a hearing**, the attorney shall continue to represent the client at public expense. See SJC Rule 3:10, § 5.

In such cases, the attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client continues to request to retain the attorney privately on the case, the attorney shall obtain a written informed consent signed by the client, stating the client's understanding of his/her right to seek other counsel for the private case.

3. Care & Protection Assignment Prior to Indigency Determination

If a client in a Care & Protection case was assigned counsel upon filing of the petition before an indigency determination was made, and the court subsequently found the client to be not indigent and struck the appearance of counsel, then the attorney may be privately retained by the client, at the request of the client.

In such cases, the attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client continues to request to retain the attorney privately on the case, the attorney shall obtain a written informed consent signed by the client, stating the client's understanding of his/her right to seek other counsel for the private case.

- B. The following matters are distinct from the underlying case and are not encompassed by the prohibition against being privately retained on a previously assigned case by the assigned client.

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1. Parole Hearings

An attorney who was assigned to represent an indigent client on a criminal matter that resulted in conviction and incarceration, may at a later date be privately retained by the client to represent the client at the parole hearing.

2. SORB cases

An attorney who was assigned to represent an indigent client on a criminal matter involving a sex offense that resulted in conviction, and which later gives rise to a separate Sex Offender Registry Board case, may at a later date be privately retained by the client to represent the client in the subsequent SORB matter if the client is no longer indigent, and the underlying assigned criminal case has concluded.

C. Erroneous assignment to cases not within the CPCS scope of services:

An attorney who was erroneously assigned by the court to an indigent client on a case that is beyond the CPCS scope of services may be privately retained by the client to represent the client in that case.

In such cases, the attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client continues to request to retain the attorney privately on the case, the attorney shall obtain a written informed consent from the client, stating the client's understanding of his/her right to seek other counsel for the private case.

4. Representation of CPCS Clients on Unrelated Cases

After an attorney has been assigned to a client's Criminal, Juvenile Delinquency, Youthful Offender, Mental Health, or SDP case, if the client wishes to retain the attorney privately on a separate unrelated case, the attorney shall advise the client of his/her right to seek other counsel. The attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client continues to request to retain the attorney privately on the separate unrelated case, the attorney shall obtain a written informed consent from the client, stating the client's understanding of his/her right to seek other counsel for the private case.

In CAFL cases there is an additional requirement for the informed consent. The client must state that the attorney advised him or her that DSS regulations required the attorney to agree not to give copies of the DSS file to anyone who was not a party to the assigned counsel case. (110 CMR 12.09).

5. Collateral Representation

A. Criminal, Juvenile Delinquency, Youthful Offender, Mental Health, and SDP cases

While a Criminal, Juvenile Delinquency, Youthful Offender, Mental Health, or SDP case is open, if the attorney wishes to receive compensation for representing a client on a collateral matter (e.g., a school expulsion case for a juvenile client), the attorney may seek permission from the appropriate Deputy Chief Counsel to provide collateral representation on related matter(s) under the same CPCS assignment. Such requests for permission to provide collateral representation should be made in writing to the appropriate Deputy Chief Counsel. The specific circumstances of the original assignment and the nature of the related or collateral matters should be briefly described in the written request. If the attorney's request to provide collateral representation is approved by the Deputy Chief Counsel, the attorney may then provide services, but s/he may not receive compensation from the client or any other source than CPCS for representation on the related case.

NOTE: If a juvenile client is committed to DYS, assigned counsel shall continue to provide representation for the initial case conference (or "staffing") at any classification proceedings and at any extension hearings. The attorney should continue to bill for this work under the original Notice of Assignment of Counsel number.

B. CAFL cases

While a CAFL case is open, if the attorney wishes to receive compensation for representing a client on a related case, the attorney should submit a request for collateral representation to the Deputy Chief Counsel, Children and Family Law Program. See Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases, section 1.3(c) ("Collateral Representation"). If the attorney's request to provide collateral representation is approved by the Deputy Chief Counsel, the attorney may then provide services, but s/he may not receive compensation from the client or any other source than CPCS for representation on the related case. After conclusion of a CAFL case, an attorney may represent the client in a related matter (see below).

C. If the attorney's request to provide collateral representation under paragraphs A or B, above, is not approved and the client wishes to retain the attorney on the collateral matter, the attorney must comply with the provisions of paragraph 4 above, "Representation of CPCS Clients on Unrelated Cases."

6. CAFL Post-Disposition Related Matters

Upon the conclusion of a CAFL case and after the assigned attorney has closed the case, the attorney may, if the client so requests, be privately retained to represent the client on a related case. However the attorney shall advise the client of his/her right to seek other counsel. The attorney shall be aware that representation of the client on such matters may create the appearance of impropriety, solicitation or overreaching. The attorney shall obtain written informed consent from the client, indicating the client's understanding of his/her right to seek other counsel and further indicating that the client understands that DSS regulations require the attorney to agree not to give copies of the DSS file to anyone who was not a party to the assigned counsel case. (110 CMR 12.09). Examples of cases in which the attorney may be independently retained after closure of the CAFL case include enforcement of open adoption agreements, actions in paternity or divorce proceedings, petitions to remove a guardian, or special education proceedings.

7. Notices of Assignment of Counsel

A Notice of Assignment of Counsel (NAC) is issued by the court or by CPCS directly for each case in which CPCS provides representation. (See Chapter I of this Manual for CPCS Scope of Services.) A copy of the NAC is also provided to the client (and to CPCS if issued by the court). Each NAC includes a number that is unique to that assignment. CPCS must have a copy of the NAC on file prior to compensating the attorney for his or her services.

An attorney will receive a NAC each time he or she is assigned to an indigent client for a legal matter within the scope of CPCS services. Attorneys should review each NAC for accuracy and completeness, and maintain a copy of the NAC in the case file.

If a case is transferred from one attorney to another, it is necessary for the court or CPCS to issue a new NAC to the new attorney. If an attorney withdraws, it is the responsibility of the attorney to notify the court or CPCS of his/her withdrawal so that a new NAC may be issued to successor counsel. It is the responsibility of successor counsel to obtain a new NAC from the court or CPCS.

8. Attorney Vendor Customer Instructions

Attorneys must have a state Vendor Customer (VC) number and a Taxpayer Identification Number (TIN) on file with the State Comptroller's office before assignments and bills can be processed.

A "TIN" is your Social Security number - or, if you work for and are paid by a firm, the firm's Federal Tax ID number. A 1099 for income earned will be

issued under this number. Please note that your 1099 will reflect the name and address you list as your legal name and address on the W-9 form (see below).

B-Notice: If your taxes are filed under a name and/or address that differ from your TIN name and address, the IRS will issue a "B" notice requesting an explanation for the apparent discrepancy. Failure to respond to a "B" notice will result in an IRS suspension of payments from the state.

To obtain an attorney vendor customer number, forms a, b, and c (below) must be completed and submitted to the attention of:

Vendor Maintenance Department
The Committee for Public Counsel Services
44 Bromfield Street
Boston MA 02108

- a. Request for Verification of Taxation Reporting Information (required):

<http://www.mass.gov/cpcs/forms/w9.pdf>
(This links to the form, including instructions)

- b. E-Bill Private Attorney PIN Agreement (required):

<http://www.mass.gov/cpcs/forms/ebillPIN.pdf>

- c. Attorney Certification Information (required):

<http://www.mass.gov/cpcs/forms/AttyCertForm.PDF>

Upon receipt of the correctly completed forms, we will forward your vendor information to the Comptroller. Once the Comptroller approves your request for a vendor code, you will be assigned (by the Comptroller) a random VC number. We will notify you of this number when we receive the information. The process takes approximately two weeks.

- d. Electronic Funds Transfer (Direct Deposit) (optional):

Payments made by direct deposit are available to you approximately three days earlier than payments sent through the mail. However, before you apply for direct deposit make sure that your bank will provide you with the detail of each payment contained in the deposit. To apply for direct deposit please visit this site (this site is also an excellent tool for tracking your checks or direct deposits):<https://massfinance.state.ma.us/>

Mass Finance/Vendor Web - Payment History

MassFinance is a Commonwealth of Massachusetts web site. VendorWeb is the application through which vendors may view their payment transactions with the Commonwealth of Massachusetts. By accessing Scheduled Payments (information on payments that will be made) and Payment History (information on payments that have been made), attorneys and other vendors can reconcile their accounts. This information is available for viewing, printing or downloading 24 hours a day.

E-Bill

All attorneys' bills, both for legal services and expenses, must be filed using the E-Bill program. You can access the website, after entering your BBO number and your PIN number (see ¶ (b), above) from any computer location. The web address is: <https://www.cpcsebill.com>

For instructions on using the E-Bill program, please see "Billing Information" in this Manual.

9. Indigent Court Costs Vendor Requirements

All vendors paid via the Indigent Court Cost fund who provide services on cases assigned to an attorney pursuant to G.L. c. 211D, are subject to the CPCS General Billing Policies and Procedures, and must maintain adequate documentation to support their billings, including detailed time records of actual hours worked. The CPCS record-keeping requirements for Court Costs Vendors are the same as the CPCS record-keeping requirements for attorney vendors. In situations in which a Court Costs Vendor's bill represents hours worked by more than one individual, a separate time sheet is required for each individual. Required documentation also includes such items as receipts, canceled checks, and mileage records. Vendors must be able to adequately support their bills.

10. Attorney Certification Requirement

It is important to become familiar with CPCS certification requirements prior to accepting cases. Attorneys accepting cases for which they are not certified, or for which there is no right to counsel, will not be paid for those cases. See Chapter I of this Manual for CPCS Scope of Services.

11. Bail-Only Cases

An attorney assigned to a case for Bail-Only will be paid only for the arraignment and bail review, and not for the full case.

CHINS Bail-Only Attorneys who are on the Children and Family Law Panel, the District Court Panel or the Juvenile Delinquency Panel, may be appointed for children in CHINS "Bail-Only" situations. An attorney with

appropriate CHINS certification (certification for children and family law cases) must be assigned to represent the child in the underlying CHINS case.

12. Late Bills

All bills must be **received** by CPCS **within thirty days of the conclusion of the attorney's representation** (see below). For case-closed bills, the last date of service billed is recognized as the date the case concluded.

For all cases open and pending at the end of the fiscal year (June 30), bills must be received by CPCS no later than August 1. Payment of year-end bills that are received after August 1 is dependent on available appropriation funding, and could be significantly delayed.

If E-Bill determines that a bill has been filed late, it will tell the attorney that s/he has missed a deadline, and it will automatically process the bill at a **10% reduction**, as required by G.L. c. 211D, § 12.

13. Representation-Concluded Bills

Prior to filing a Representation-Concluded Bill, **all** matters under a single NAC number must have concluded. An attorney cannot file a Representation-Concluded bill if one or more of the matters on the NAC have been resolved, while other matters are still pending. The attorney must wait until all matters have been disposed of. Representation-Concluded bills must be received by CPCS within 30 days of the last service date billed.

If it is necessary to reopen a case, the attorney must submit a written request to reopen the NAC. The request should include the NAC number, client name, and an explanation as to why the case needs to be reopened. If a client is being surrendered on a case on which a Representation-Concluded Bill was filed, the NAC cannot be reopened; a new NAC must be obtained from the court by the attorney.

14. Determining When Representation Is Concluded

A. Criminal, Juvenile Delinquency, and Youthful Offender Proceedings

In criminal, juvenile delinquency, and youthful offender proceedings, representation is considered concluded for billing purposes as of the date of any of the following events:

1. date of default of client
2. date of disposition hearing*
3. date of plea hearing or trial*
4. date that attorney withdraws from case

5. date that attorney reports case to bar advocate program or CPCS for reassignment

* NOTE: Even if a client is placed on probation, or given a continuance without a finding, the conclusion of the case for billing purposes is the date of the hearing or court decision, not the date of the end of the probationary term.

If a juvenile in a juvenile delinquency or Youthful Offender matter is committed to DYS, assigned counsel should **continue to provide representation for the initial case conference (called the "staffing"), at any classification proceedings and at any extension hearings.**

B. Children and Family Law Proceedings

In children and family law proceedings, a case at the trial level is considered concluded for billing purposes in the following circumstances:

1. If you represent a parent or a child, upon the earliest of the following:
 - a. The child is adopted;
 - b. The child attains majority;
 - c. The only subject child, or the client, has died;
 - d. Counsel has withdrawn for all purposes (not for purposes of obtaining appellate counsel);
 - e. Counsel's appearance, or the appearance of the client, is struck, and no appeal has been filed regarding such action;
 - f. The case is dismissed, and no appeal has been filed;
 - g. The child is the subject of an allowed "permanent" (as opposed to temporary) guardianship petition, and no appeal has been filed; or
 - h. A dispositional order granting "permanent" custody of the subject child to a parent or third party (but not DSS), and no appeal has been filed.
2. In addition, if you represent a parent, upon the earliest of the following:
 - i. A petition to dispense with the parent client's rights has been allowed, and no appeal has been filed; or
 - j. Final resolution of appeal of a decree dispensing with consent, including withdrawal of the appeal.

In the event of an appeal of an order under (a) through (i) above, the case is considered concluded for billing purposes upon conclusion of briefing. Trial counsel who believes that ongoing work after briefing is necessary should contact the CAFL office with regard to keeping the assignment open.

A case is not considered concluded because there has been no recent court activity on the case.

Cases that are inadvertently closed by the attorney during the billing process may be re-opened upon written request to and approval of the CAFL program. Forms for re-opening such cases are available on the CAFL section of the CPCS website. Cases cannot be re-opened, however, if there is no longer a right to counsel in the proceeding. (See Chapter I for a list of proceedings in which there is a right to counsel.) For example, there is no right to counsel in an action to enforce an open adoption agreement under G.L. c. 210, §§ 6C-E, or in an action to remove a guardian in cases where DSS is not a party.

C. Mental Health Proceedings

In mental health proceedings, representation is considered concluded for billing purposes as follows:

1. Civil Commitment (no judicial review ordered): After explaining the disposition and appellate rights to the client and, when requested to do so by the client, upon filing a Notice of Appeal.
2. Civil Commitment (judicial review ordered): Quarterly billing is permissible until the judicial review takes place. Upon conclusion of the judicial review, the case is considered concluded for billing purposes.
3. Substituted Judgment (Rogers): Quarterly billing is permissible until expiration of the order. Upon expiration of the order, the case is considered concluded for billing purposes.
4. Sexually Dangerous Persons: same as in criminal proceedings, listed above.

D. Sex Offender Registry Board Proceedings

In Sex Offender Registry Board (SORB) matters, representation is considered concluded for billing purposes as of the date of any of the following events:

1. if client does not appear for administrative SORB hearing, date when attorney has not located client after due diligence;
2. date when client elects not to appeal SORB hearing examiner decision;
3. deadline by which SORB Superior Court review papers must be filed, if client cannot be located after due diligence;
4. date when client elects not to appeal Superior Court judge's decision reviewing the SORB hearing examiner's decision;
5. date when attorney has completed procedures for referring a SORB case to CPCS for appointment of appellate counsel;
6. date when attorney is informed by CPCS that the case has been reassigned.

E. Defaults

If a client defaults, CPCS must receive a bill from the attorney within thirty days of the default date. When and if the client reappears, the same attorney should resume representation, using the same Notice of Assignment of Counsel number. The attorney must also submit to CPCS a written request to re-open the case.

Immediately following the resumption of representation, the attorney should notify the CPCS Private Attorney Payment Department in writing (either by FAX or mail) that the case was reopened due to the reappearance of a defaulted client or for another appropriate reason.

15. Probation Surrenders

Probation surrenders require a new assignment form (NAC) from the court. The new NAC form is necessary in order for CPCS to maintain accurate records of probation surrenders of CPCS clients.

16. Caseload Limits

Attorneys may accept no more than the following number of cases for a single fiscal year:

- Superior Court jurisdiction criminal cases... ..200 per year, or
- District Court jurisdiction criminal cases ... • .400 per year, or
- Delinquency cases 300 per year, or
- Children and Family Law cases... • ... 200 per year , or
- Mental Health cases 200 per year, or
- Sexually Dangerous Person cases ... • ...200 per year, or
- Sex Offender Registry Board cases ... • .300 per year, or
- CHINS 300 per year

[In addition to these caseload limits, Children and Family Law case assignments are further limited to 75 open cases. See section on Children and Family Law: Pending Caseload Limits in this manual.]

Each category of cases represents 100 percent of an attorney's allowable caseload. Thus, during the 12-month period, if an attorney is assigned 200 district court cases, it would represent 50 percent of the number of cases which could be accepted. The attorney could accept 200 District court cases, 50 Superior Court cases and 50 Mental Health cases in one year. Or the attorney could handle 150 Delinquency cases, 50 Children and Family Law cases, and 100 District Court cases in one year. Any combination of cases in each category adding up to the maximum caseload will represent a 100 percent caseload.

"Bail only" cases, "bail review" cases, and cases under G.L. c. 112, § 12S (petitions of minors seeking abortions), G.L. c. 123, § 12(e) ("warrants of apprehension"), and G.L. c. 123, § 35 (commitment for alcohol- or substance-abuse) will not count as a case.

Defaulted cases **DO** count as a case; therefore, in the event that a defaulted client reappears at a later date, the client should be reassigned to the originally assigned attorney, under the **same** Notice of Assignment of Counsel form.

Superior court and district court jurisdiction cases are determined by the severity of the charge, and not by the court of origin or disposition. Cases in which the defendant is bound over to the grand jury should be assigned to the same Superior Court-qualified attorney under the same Notice of Counsel form to avoid duplication of assignments.

It is each attorney's responsibility to keep track of his or her caseload. Attorneys who exceed the Committee's caseload limits will not be compensated for cases that exceed the respective caseload limits. Case assignments in excess of the Committee's limits will be reassigned.

17. Billable Hours Limit Per Fiscal Year

CPCS sets an annual cap of billable hours per fiscal year. Attorneys will not be paid for any time billed in excess of the annual limit of billable hours. The cap is intended: 1) to enhance the quality of representation provided to CPCS clients; 2) to achieve a more equitable distribution of assignments among CPCS-certified counsel; and 3) as an additional guard against over-billing.

It is each attorney's responsibility to keep track of his or her billable hours. Attorneys who reach the billable hour cap prior to the end of the fiscal year shall not accept new case assignments for the remainder of the current fiscal year.

Attorneys who exceed the billable hour limit will not be compensated for hours billed in excess of the cap per year. To avoid prejudice to clients, attorneys must nevertheless complete their representation of any clients and cases for which they have accepted assignment, regardless of the cap on billable hours.

An attorney who has billed in excess of the annual cap may not bill as an associate or paralegal, or for any other services on other CPCS case assignments. Further, an attorney who has billed in excess of the annual cap may not bill for an associate or paralegal to complete work on open cases.

The hours that an attorney bills for work s/he performs as an associate on any CPCS cases are included in, and count towards, the attorney's billable hours limit per fiscal year.

18. Monthly Interim Billing

Effective for bills submitted on and after December 1, 2007, it is strongly recommended that attorneys submit E-Bills monthly. CPCS will process monthly bills for payment in accordance with the following procedures:

a) Monthly billing will be limited to one interim bill per NAC (Notice of Assignment of Counsel) number per month. **Once an interim bill for a NAC is submitted, another interim bill cannot be submitted until the following month**

b) If dates for a particular month have been inadvertently omitted, those dates may be included with the following month's bill, as long as the dates do not cross fiscal years.

c) Once a fiscal-year-end bill has been submitted, no additional dates or hours for that fiscal year can be billed.

d) An attorney can file an interim bill, a case-closed, and a year-end bill on the same NAC in the same month, **but year-end bills may not be submitted prior to June 15**

e) All fiscal-year-end bills must be received by CPCS no later than August 1, or be subject to an automatic 10% reduction, pursuant to G.L. c. 211D, § 12.

Additionally, all bills for cases in which your representation has concluded must be received by CPCS within 30 days of the last billable date of service, or be subject to an automatic 10% reduction, pursuant to G.L. c. 211D, § 12.

f) All bills that have been received in good order by the 15th of the month will be processed and forwarded to the Office of the State Comptroller (OSC) for payment within 7 business days of the 15th; bills received in good order between the 16th and the last day of the month will be processed and forwarded to OSC for payment within 7 business days of the last day of the month.

If any of the dates listed above fall on a Saturday, Sunday, or holiday, the processing of bills and/or the date of forwarding bills to OSC for payment, will be extended to the next business day.

The timing of all payments is subject to appropriation availability.

19. Ten-Hour Daily Billing Limit

Attorneys are limited to billing actual reasonable time for legal services up to a presumptive maximum of ten billable hours per day. Bills submitted in excess of ten hours per day will be reduced to ten hours. Murder cases are exempt from the ten-hour daily billing limit. The presumptive daily billing cap for dates on which the attorney was on trial and billed Trial hours is 14 hours.

The ten-hour daily billing limit does not imply that all dates on which ten hours or less are billed are accepted by the Committee as accurate. Cumulative daily hours billed must represent the **actual** time spent working, be properly documented, and be in conformance with all CPCS policies and procedures.

An attorney may request a waiver of the presumptive ten-hour billing limit by submitting a Request for Waiver form for each date the attorney wishes to be compensated for time in excess of ten hours, prior to billing for that date. Each date for which the attorney wishes to be compensated for more than ten hours requires a separate form.

The Request for Waiver form available at <http://mass.gov/cpcs/forms/10hrWaiverform.PDF> must be **faxed to the attention of the "Ten-Hour Waiver Coordinator" at 617-988-8495 and approved after providing the services and before billing for more than ten hours for services performed on the requested Waiver Date.**

The Request for Waiver form must be submitted as early as possible - ideally, the day after the attorney concludes a workday on which the attorney performed more than ten hours of service on assigned cases.

If the attorney submits bills exceeding 10 hours at any time after submitting a waiver, but before the waiver is approved, the attorney will be limited to a maximum of ten billable hours on that date. CPCS will not make adjustments of data entry errors made by attorneys/vendors, however inadvertent. Attorneys must obtain approval of waivers in time to submit their bills before the thirty-day billing deadline.

20. Two-County Limit

- A. Superior Court (Criminal), District Court (Criminal), Delinquency, and Youthful Offender (YO) Panels.

Attorneys may participate in no more than two county bar advocate programs. **The attorney's office(s) must be within geographic proximity to the courts in which s/he wishes to accept assignments.**

- B. CAFL, Mental Health, Sexually Dangerous Person (SDP), Sex Offender Registry (SOR), Murder, and Appellate Panels.

There is no limit on the number of counties applicable to members of these panels.

21. Bilingual Attorneys

- A. Superior Court (Criminal), District Court (Criminal), Delinquency, and YO Panels.

The Committee for Public Counsel Services has adopted a policy to permit inter-county case assignments to bilingual attorneys, to improve access to justice for linguistic minorities. This policy waives the two-county limit on these panels to allow bilingual attorneys to receive additional individual case assignments to represent non-English speaking clients.

Attorneys will be certified as bilingual for these case assignments by submitting to the Committee for Public Counsel Services, Private Counsel Division Director of Supervision and Evaluation, information regarding their fluency in a language or languages spoken by significant numbers of the Committee's clients. A list of attorneys certified as bilingual will be circulated to all Bar Advocate Programs.

B. CAFL, Mental Health, SDP, SOR, Murder, and Appellate Panels.

Bilingual attorneys on these panels, should submit to the appropriate CPCS Unit information regarding their fluency in a language or languages spoken by significant numbers of the Committee's clients. A list of bilingual attorneys will be maintained by the Unit and circulated to courts as appropriate.

This policy should be used in concert with case assignment policies to provide the best access to counsel and the best representation possible for our clients.

The Performance Guidelines published by the Committee for Public Counsel Services apply in all respects to special assignments to bilingual attorneys. The Committee expects counsel to meet regularly with the client, in a professional setting readily accessible to the client. The attorney is responsible for making her/himself available to the client, regardless of geographic distance.

22. Children and Family Law Cases: Pending Caseload Limit

The Committee has established the following maximum caseload limits for open Children and Family Law cases that an attorney may carry at one time. Open cases include cases that are both pre-judgment and post-judgment:

- Child Welfare Cases - 75.

A "child welfare" case is defined, for the purposes of the pending caseload limit, as care and protection petitions, including petitions filed in juvenile court under G. L. c. 119, § 24; petitions filed in the probate and family court pursuant to G.L. c. 119, § 23(C); petitions filed pursuant to G.L. c. 210, § 3; permanency hearings under G.L. c. 119, § 29B; where the case arises pursuant to G.L. c. 119, § 23 (A); any other civil action in which a child or an indigent parent is entitled to assignment of counsel pursuant to G.L. c. 119, § 29, or *Balboni v. Balboni*, 39 Mass. App. Ct. 210 (1995); and appeals of judgments in such cases; or

- CHINS cases - 100; or
- 100 combined CHINS and child welfare cases, provided that the number of child welfare cases does not exceed 75.

23. Children and Family Law Cases: Client Contact Certification

A Client Contact Certification form must be completed by all attorneys when submitting their bills through the E-Bill system on all Children and Family Law cases, including CHINS cases.

The certification should detail in-person client contact only and must include the client's name, and the date and location of the meeting. If the client is a child, the form should include the name of the substitute care provider. In the event that the attorney represents multiple child clients on the same NAC who are in separate placements, a separate client contact certification form must be provided for each child client. If no client contact is had within the billing period, the form should be completed and marked "No In-Person Client Contact" in the section of the form where contact should be detailed.

24. Submission of Bills and Record-Keeping Requirements

Attorneys and vendors who accept assignments through CPCS and who submit bills to CPCS are subject not only to performance evaluations, but also to audits of cases, caseloads and bills. On-site audits may be performed at the attorney's/vendor's home office and/or business office.

Attorneys/vendors **must** make available to the Audit and Oversight Department all case file and billing documentation. Failure to comply with the Audit and Oversight Department's request(s) for information will result in temporary suspensions as described in Section VII (I) of this Manual.

Attorneys may be subject to repayment of over-billings, as well as payment of interest and penalties for audits. See Section VII Appendix A of this Manual.

Do not submit bills to the courts.

All bills must be received by CPCS within thirty days of the conclusion of a matter in order to be processed for payment. For ALL matters pending at the close of a fiscal year (June 30), bills for services rendered in that year must be received by CPCS by August 1.

Effective for bills submitted on and after December 1, 2007, attorneys may submit interim monthly E-bills, in accordance with Section 18, above.

REMINDER: The commonwealth's fiscal year runs from July 1 through June 30. Please submit separate bills for each fiscal year. End-of-year bills must be received no later than August 1 of that year.

NOTE: All bills (paid and unpaid) are subject to audit by the Committee and/or by the state auditor. Supporting documentation may be requested from attorneys/vendors or obtained from the court.

A. Quarter-Hour Increments.

Attorneys are required to **bill** in quarter-hour increments. This means rounding off the amount of time actually spent working to the **nearest** quarter hour. You may **not** automatically round each separate task **up** to the next quarter hour.

For example:

- If you spend 10 minutes on a case, you may bill .25 hours. If you spend 20 minutes on a case, you may still bill only .25 hours.
- If you spend 5 minutes investigating a case, and 5 minutes interviewing a client, you may bill .25 hours for **either** client interview **or** for investigation, but not both.
- If you make four 5-minute telephone calls, you may bill .25 hours. You may not bill .25 hours for each of the four separate telephone calls.
- If you perform only **one task during the entire day** for all your CPCS cases you may round this one task to a quarter-hour. For example, if you make only one 5-minute phone call and perform no other services on behalf of any CPCS clients the rest of the day, then you can bill .25 hours for that one telephone call. However, if you make a second 5-minute phone call on another CPCS client (or even three more 5-minute phone calls) later in the day, you may not bill more than the original .25 hours. The combined time it takes to perform all tasks for CPCS clients in one day should be rounded to the nearest quarter-hour and billed accordingly.

Your bills should reflect the total actual time you spent on your cases each day. You may find you cannot bill for every single item of work you performed, since the quarter-hour increments would improperly inflate your billable hours.

B. Time Records:

Attorneys are required to maintain case files for all CPCS cases containing, among other things, billing forms, **contemporaneous time records**, motions, affidavits, memoranda, and other documents prepared in each case, whether or not filed with the court, and any other reports or documents prepared in each case. If legal research was performed, a summary of the legal issues researched, including the materials obtained and/or reviewed, should be kept in the file. These files **must** also include a daily log or diary which records how much time the attorney spent working that day, where the attorney was, what clients s/he represented, together with a sufficiently specific description of services s/he performed.

Time records must minimally include the date of the activity, client name, actual amount of time expended, and a description of each task performed. Descriptions of tasks and services must be sufficiently specific and detailed to enable one to understand the nature and extent of the service performed, **including, as to legal research, the specific issue(s) researched**. Each billable task must be segregated and described separately. Billing forms may not be used as time records. Billing form category headings should not be used on time records, as they are not sufficiently specific and detailed descriptions of services.

Attorneys should cross-reference their cases, so that on any given day, their bills for several clients will total the actual amount of time they spent working on cases that day.

Attorneys must record all the work they perform, in order to get paid for it and to document work performed in the event of an audit. If an attorney does research or prepares a case on a Sunday night, the time must be billed for that Sunday. Work performed on a specific date must be billed for that date, regardless of what day of the week it is, or what time of the day or night.

Attorneys should continue to record the time they expend on work they perform for each service date **even if the hours exceed the presumptive 10-hour daily total billing cap**. Except in murder cases, and except on dates with billed Trial hours, attorneys may not bill for any hours that exceed the 10 hour cap, unless a prior waiver has been submitted and approved by the appropriate Deputy Chief Counsel (see 10-hour Billing Limit section of the manual). Attorneys may not bill the excess hours to the next calendar or service date.

For example:

An attorney works 12.50 billable hours in one day, elects not to fill out a waiver form, and bills only 10 hours. The attorney's time sheet must include all 12.50 hours worked, not just the 10 hours billed. Attorneys are reminded that complete and accurate time records are the single most important documentation of hours billed.

Attorneys are required to keep these contemporaneous time sheets, together with copies of their bills, in their client files for a period not less than seven (7) years after the date of submission.

Failure to document work performed in accordance with CPCS billing policies and procedures, or failure to provide documentation to auditors, may result in 1) the nonpayment of bills; 2) the reduction of amounts paid on bills; or 3) repayment assessments for bills that have been paid, together with possible interest and penalties.

C. Non-compensable Activities.

Attorneys may not bill for routine law office administrative/managerial tasks, nor can they bill for routine case administration tasks. (See also Section 26, Office-Related Expenses.) Routine law office or case administrative tasks include, but are not limited to, the following examples:

- time spent keeping time records, filling out billing forms, or submitting bills;
- notifying clients and/or courts of a change of address for your law office;
- activities considered to be legal training or education
- notifying court or other entities that you are not certified to accept Superior Court or other types of cases;
- time spent performing secretarial and/or clerical functions, such as:
 - typing, preparing envelopes or labels;
 - preparing packages for mailing or parcel pick-up.
- opening/setting up files and closing files.

D. Waiting Time

Attorneys may bill for **ACTUAL** time spent waiting **IN COURT** for **UP TO ONE HOUR** per client for each court date. Attorneys may not bill for more than three hours of waiting time per day for all CPCS clients. Attorneys may **not** automatically bill one hour per client per court appearance. The time billed must accurately reflect **ACTUAL** time spent waiting, **not to exceed** one hour per client.

The three-hour daily waiting time limit does not imply that billing three hours or less of waiting time is automatically accepted as accurate. Cumulative waiting time hours billed must represent the actual time spent waiting in court that day up to three hours, be properly documented, and be in conformance with all CPCS policies and procedures.

Waiting time does not include time productively spent in court while waiting for a case to be called. In other words, waiting time does not include time spent talking to the client, witnesses, or the prosecutor; it does not include time spent looking at probation records, reviewing law, or preparing for argument. (Those tasks should be recorded on your contemporaneous time sheets and billed in the appropriate category on the E-bill form.)

Attorneys should bill their waiting time after they have billed for all other services that day. You may find that you cannot bill for waiting time, if the total number of hours billed for other services equals the actual in-court time worked that day.

For example:

- The attorney has two clients and waits a total of twenty minutes for the cases to be called. The attorney may bill .25 hours of waiting time ON ONLY ONE OF THE TWO CASES. The attorney can bill on whichever one s/he wants.
- The attorney has two clients and waits thirty-five minutes for the cases to be called. The attorney may bill a TOTAL of .50 hours of waiting time. S/he may bill .50 hours to one client, and nothing to the second client; or, s/he can bill each client .25 hours of waiting time.
- The attorney has two clients and waits one hour and twenty minutes for the cases to be called. The attorney may bill a TOTAL of 1.25 hours of waiting time. S/he may bill 1.0 hour to one client, and .25 hours to the second client; or s/he can bill .75 hours to one client and .50 hours to the second client. The attorney can divide the total waiting time among her/his clients, as long as the total waiting time does not exceed actual time.

If the attorney, as in this example, spent only one hour and twenty minutes waiting, but s/he had three or more clients instead of two, s/he can bill for no more than a TOTAL of 1.25 hours waiting time.

- The attorney has two clients and waits four hours for the cases to be called. The attorney may bill one hour per client, or a total of two hours. If the attorney has four clients and waits four hours, s/he can bill one hour per client for three of the clients, for a total of three hours, since there is a three-hour waiting limit per day. If the attorney has six clients and waits four hours, s/he can bill no more than a TOTAL of three hours.
- The attorney has one client with three separate cases (and three separate NACs) scheduled for hearing on the same court date. The attorney waits two hours. S/he may bill a maximum of one hour for that client.

25. Associates, Co-Counsel, and Paralegals

A. Associates

CPCS makes assignments to individual attorneys, not firms. While CPCS holds the individual attorney responsible for the case to which s/he is assigned, the assigned attorney may engage the services of an associate member of the bar when necessary to assist in the case.

Associates are restricted to performing the following legal tasks: legal research, legal writing, investigation, and client interviewing.

Assigned attorneys may not delegate to associates the handling of continuances, hearings, or any part of a trial or oral argument. Associates may not bill for negotiating with opposing counsel, waiting time, travel time and mileage, or expenses.

In murder cases, attorneys may use the services of an associate for assistance at counsel table during trial and at hearings. Permissible trial assistance includes taking notes, keeping track of exhibits and documents, conferring with the client, and keeping track of witnesses. Associates who provide assistance at counsel table may not examine witnesses, make arguments before the court at trial or at any hearing, or participate in the presentation of evidence. These in-court activities may only be performed by the assigned attorney. CPCS will reimburse the assigned murder attorney for the trial assistance services of not more than one associate at each court event.

Attorneys who wish to use the services of an associate to provide trial assistance on civil and criminal assignments that are not murder cases must receive prior written approval from the appropriate Deputy Chief Counsel.

Associates must keep contemporaneous time records, itemizing each date, the time expended, and tasks performed on that date by the associate on the case. The description of tasks and services should be sufficiently specific and detailed to enable one to understand the nature and extent of services provided.

Bills for associate services must be submitted by the assigned attorney via E-Bill, using the E-Voucher/Associate option. The assigned attorney must attach to the E-Voucher a certification from the attorney and from the associate that the attorney has paid, and the associate has received, the amount billed. CPCS cannot pay an associate directly. See the E-Bill Manual for further instructions.

CPCS will reimburse for the services of an associate at the maximum rate of \$40.00 per hour. Attorneys must keep appropriate documentation of payments to associates.

CPCS will not reimburse for an associate's waiting time or travel time and mileage, nor will it pay for an associate's expenses.

CPCS will not reimburse for more than 10 hours per day of associate time.

The hours that an attorney bills for work s/he performs as an associate on any CPCS cases are included in, and count towards, the attorney's billable hours limit per fiscal year.

An attorney who has billed in excess of the annual hourly billing limit may not bill as an associate on other CPCS case assignments. Furthermore, an attorney who has billed in excess of the annual hourly billing limit may not bill for an associate to complete work on open cases.

Attorneys may not delegate associate tasks to attorneys suspended by CPCS, nor may attorneys delegate associate tasks to attorneys who have reached the Committee's presumptive daily or annual cap on billable hours. CPCS will not reimburse attorneys for associate services performed by suspended attorneys or by attorneys who have reached the Committee's cap(s) on billable hours.

Delegation of prohibited tasks to associates is a violation of the CPCS Performance Guidelines and Standards.

B. Co-Counsel

Attorneys may request that CPCS assign qualified co-counsel to assist in the representation of clients in particularly complex cases. Such requests shall be made in writing to the appropriate Deputy Chief Counsel, and shall fully describe those unique and complex aspects of the case that indicate that the assignment of co-counsel is warranted.

C. Paralegals

The assigned attorney may engage the services of a paralegal when necessary to assist in the case. CPCS will reimburse for the services of paralegals at the maximum rate of \$18 an hour for the following tasks only: legal research, investigation, client interview, and trial assistance.

Paralegals may not handle hearings, trials, or oral arguments. Such tasks may only be performed by the assigned attorney. CPCS will not reimburse for the paralegal's waiting time, travel time and mileage, or the paralegal's expenses.

Bills for paralegal services must be submitted by the assigned attorney via E-Bill, using the E-Voucher/Paralegal option. Upon its completion, the paralegal E-Voucher must be printed, signed by both the paralegal and the attorney, and submitted to CPCS accompanied by the paralegal's detailed itemization of dates and tasks performed. The description of tasks and services submitted should be sufficiently specific and detailed to enable one to understand the nature and extent of services provided.

CPCS cannot pay a paralegal directly. See the E-Bill Manual for further instructions.

CPCS will not reimburse for more than 10 hours of paralegal services per day.

Attorneys must keep appropriate documentation of payments to paralegals.

No person compensated for paralegal services may be a former client of the attorney. To qualify for compensation, a paralegal must possess either:

1. certification from an accredited paralegal education program, or
2. successful completion of at least one year at an accredited law school, or
3. prior approval of the appropriate Deputy Chief Counsel.

An attorney who has billed in excess of the annual hourly billing limit may not bill as a paralegal on other CPCS case assignments. Furthermore, an attorney who has billed in excess of the annual hourly billing limit may not bill for a paralegal to complete work on open cases.

Attorneys may not delegate paralegal tasks to attorneys suspended by CPCS, nor may attorneys delegate paralegal tasks to attorneys who have reached the Committee's presumptive daily or annual cap on billable hours. CPCS will not reimburse attorneys for paralegal services performed by suspended attorneys or attorneys who have reached the Committee's cap(s) on billable hours. Delegation of prohibited tasks to paralegals may be a violation of the CPCS Performance Guidelines and Standards.

26. Office-Related Expenses

A. Routine Law Office Overhead

The Committee will **not** reimburse for routine law office expenses such as typing, secretarial services, faxing, internet services, or law books. The Committee will **not** reimburse for subscription costs, membership fees, or monthly service charges for online legal research tools such as Westlaw or LEXIS. Attorneys can, however, bill for their **time** spent performing necessary online legal research.

B. Photocopying and Postage

The Committee will reimburse for reasonably necessary, properly documented photocopying and postage expenses. An attorney's in-house photocopying will be reimbursed at a rate not to exceed ten cents per copy.

C. Telephone Bills

The Committee will reimburse for collect and toll calls which are reasonably necessary to the representation of a client, provided that the attorney submits copies of the telephone bills to the Committee with those calls highlighted (and other calls deleted if you wish).

27. Client Personal Expenses

CPCS generally does not reimburse for a client's personal expenses such as transportation or other services. If a client needs assistance of a personal nature, counsel must seek authorization from the appropriate Deputy Chief Counsel, prior to filing a motion pursuant to G.L. c. 261, §§ 27A-27G, for such expenses.

With a court-approved motion pursuant to G.L. c. 261, §§ 27A-27G, CPCS will reimburse an attorney's expenditures for an incarcerated client's reasonable courtroom attire for appearances at trial, not to exceed \$100.

28. Travel Expenses

A. Automobile Travel Expenses Generally

Subject to ¶ C, automobile travel expenses (mileage at .40 per mile) are compensable for reasonably necessary assignment-related travel **exceeding thirty miles round-trip**. Subject to ¶ C, attorney *time* at the hourly rate of the case is compensable for all travel, including travel less than thirty miles round-trip, except travel under 30 miles to and from court. See ¶ B, below, for automobile travel policies for client-visits. See ¶ D, below, for automobile travel billing procedure.

B. Automobile Travel Expenses for Client-Visits

Subject to ¶ C, travel for **client-visits** is compensable (time at the hourly rate of the case and mileage at .40 per mile) even if the automobile travel to visit the client does not exceed thirty miles round-trip. See ¶ D, below, for automobile travel billing procedure.

C. Out-of-State Automobile Travel - Attorneys:

If out-of-state automobile travel exceeds 150 miles round-trip, the attorney must submit a written request to the appropriate Deputy Chief Counsel, and receive prior approval before incurring such expenses.

D. Billing for Travel Expenses

"Assignment-related travel" includes, but is not limited to, the following:

1. travel to and from a court for court appearances, if the travel exceeds 30 miles;
2. travel to and from the scene of a crime; and
3. travel to and from other locations in order to interview witnesses, investigate and research a case.

The threshold distance of thirty miles for all assignment-related travel (except client-visits) is measured from the attorney's nearest office OR his/her home to his/her destination, whichever distance is shorter. A reminder: an attorney's office must be within reasonable geographic proximity to the court(s) in which the attorney practices.

When billing for travel expenses in E-Bill (including client-visits), the date, the originating city or town, and the destination city or town, as well as the total miles traveled, must be noted for each occurrence.

For example, if an attorney has an office in Worcester, and s/he has a hearing before a Single Justice of the SJC in Boston (which is a distance greater than 30 miles round-trip) s/he would be able to:

1. Request reimbursement for **mileage** in the E-Bill system as follows: ***12/15/05: From office in Worcester to Boston for hearing in SJC, 80 miles round-trip @ .40 = \$32.00***
2. The attorney may *also* bill for compensation for **time** in the E-Bill system by recording the time spent traveling, to the closest one-quarter hour. All reasonable attorney travel time is compensable at the hourly rate of the case.

Failure to record travel time and expenses in the foregoing manner may result in the delay or nonpayment of bill submissions for such travel time or expense.

NOTE: Attorneys may not combine personal and case-related travel. CPCS will not reimburse attorneys for travel that is partially personal in nature.

E. Parking Expenses and Tolls:

The Committee will not reimburse for parking expenses and/or tolls, unless these expenses are *reasonable* and are incurred in connection with reimbursable travel expenses, as previously explained.

F. Out-of-State Witnesses

1. Expert Witnesses Traveling from Out-of-State

See Chapter 6 of this Manual.

2. Non-Expert Witnesses Traveling from Out-of-State

Prior to incurring costs, an attorney must submit a written request to incur extraordinary expenses to the attention of the appropriate Deputy Chief Counsel, and file a motion with the court for out-of-state witness travel, pursuant to G.L. c. 261, §§ 27A-G. Assigned counsel must also file with the motion an affidavit explaining why the witness's testimony is necessary.

29. Other Expenses

For unusual expenses by type or cost, including travel other than by automobile, authorization from the appropriate Deputy Chief Counsel, is required *prior to incurring costs*. Failure to seek prior approval will affect the reimbursement process for such expenses.

30. Expenses: Documentation Required

The Comptroller of the Commonwealth requires that CPCS obtain complete documentation, including all receipts and an itemization of all expenses, prior to reimbursing attorneys for any expenditure. Legible receipts in the form of a canceled check, or other document that clearly indicates that the bill was paid, and indicating the date, amount of expenses, and name of vendor must be submitted with the attorney's E-Voucher.

31. Expenses: Billing Instructions

All attorney bills, including expenses, must be filed through E-Bill. Expenses are filed using the E-Voucher option. Please see the E-Bill Manual for further information.

32. No-Case Duty-Days [Applies Only to Dates Assigned by County (Bar Advocate) Assignment Programs]

Duty attorneys who receive no case assignments of any sort (including arraignment only, bail only or bail review) on their assigned duty-day may be compensated for time spent on duty at the court. Thus if the attorney is on duty at the court for 6 hours without receiving any case assignment, s/he may be compensated for 6 hours; if the duty attorney is released earlier, s/he may be compensated for the lesser time actually spent on duty at the court. This time is compensated at the district court rate.

Attorneys must complete a No-Case Duty-Day form, provided by the county program that assigned the duty-day, in order to receive payment from the Committee for the compensable time. The form must be approved by the program administrator and submitted by the program directly to the Committee. The time for which the attorney is compensated is counted as billed hours by the Committee.

For purposes of this policy, a "case" includes assignments for arraignment only, bail only, arraignment and bail or 1 or more bail review(s). Thus, if an attorney is assigned to one case for bail only, the attorney may not seek compensation for a No-Case Duty-Day. The attorney may, however, bill for actual time spent representing the client on that assignment and for actual time spent waiting, up to one hour. An authorized Notice of Assignment of Counsel form is required for such an assignment, as for all assignments.

33. Compensation Rates

The following represents the current payment structure for compensation of attorneys assigned through the Committee:

A. Matters Paid At \$60.00 Per Hour

Effective for services rendered on or after 7/1/05, the following types of legal services will be paid at the rate of \$60.00 per hour for in-court and out-of-court work:

- All cases that require a Superior Court certification, including Sexually Dangerous Person proceedings, wherever the case is heard (rate applies to trial and appeal). Rate does not apply to bail-only or arraignment-only assignments in the District court.
- All cases that require a Youthful Offender certification (rate applies to trial and appeal). If the case involves charges not included in the CPCS Presumptive Youthful Offender list (see Youthful Offender section of this Manual), but the juvenile was nevertheless later indicted as a Youthful Offender, then the delinquency portion of the case is compensable at \$50.00 per hour until the date of the indictment. The Youthful Offender portion of the case is compensable at \$60.00 per hour, from the date of the post-indictment arraignment until the conclusion of the case. **(Attorneys must submit copies of the indictment(s), together with copies of the NAC form, in such cases to CPCS, attention: Youthful Offender Staff Counsel.)** The attorney should also get a new NAC for the case once the juvenile is indicted.
- Criminal felony charges that are within district court jurisdiction (G.L. c. 218, § 26) are called concurrent felonies because they are within the jurisdiction of both the district and superior courts. The required certification depends on the court in which the case is heard. These cases will be paid at \$50.00 per hour when heard in district court and \$60.00 per hour when heard in superior court.
- All post-conviction matters (other than murder convictions) in which the defendant was convicted in Superior Court or was convicted as a Youthful Offender.
- All mentors.
- Bail Petitions heard in the Superior Court.

B. Matters Paid At \$50.00 Per Hour

Effective for services rendered on or after 7/1/05, the following types of legal services will be paid at the rate of \$50.00 per hour for in-court and out-of-court work:

- Bails and Bail Reviews on all cases in the District Court.

- All appeals from denial of motions for funds in District Court cases heard in the Appellate Division of the District Court.
- Writs of Apprehension (G.L. c. 123, § 12(e)).
- Commitment for Alcohol- or Substance-Abuse (G.L. c. 123, § 35).
- Criminal felony charges that are within district court jurisdiction (G.L. c. 218, § 26) are called concurrent felonies because they are within the jurisdiction of both the district and superior courts. The required certification depends on the court in which the case is heard. These cases will be paid at \$50.00 per hour when heard in district court and \$60.00 per hour when heard in superior court.
- Petitions for review of sex offender designation (G.L. c. 6, § 178M. [These are civil cases heard in Superior Court.]
- Children and Family Law cases, including CHINS.
- Mental Health cases.
- Minors Seeking Abortion ("Mary Moe") cases (G.L. c. 112, § 12S, Offense Code 1005).
- Probate Contempt cases where a criminal complaint has been issued.
- All other criminal cases not listed above.

C. Matters Paid At \$100.00 Per Hour

Effective for services rendered on or after 7/01/05, First- and Second-Degree Murder trials and murder appeals will be paid at \$100.00 per hour.

SUMMARY (effective for services rendered on or after 7/1/05):

Murder Cases ...	\$100.00/hour
Cases Requiring Superior Court Certification ...	\$60.00/hour

Cases (Not Bail-Only Assignments) Requiring Youthful Offender Certification...	\$60.00/hour
Substantive Criminal Cases Heard in Superior Court	\$60.00/hour
Criminal Cases not requiring Superior Court Certification Heard in District Court	\$50.00/hour
Juvenile Delinquency Cases not requiring Youthful Offender Certification	\$50.00 per hour
Bail-Only Assignments in District Court	\$50.00/hour
Bail-Only Assignments in Superior Court	\$60.00/hour
District Court Bail Reviews	\$50.00/hour
Bail Petitions in the Superior Court	\$60.00/hour
Mentors in all cases	\$60.00/hour
Petitions for Review of Sex Offender Designation	\$50.00/hour
Mary Moe cases (G.L. c. 112, § 12S)	\$50.00/hour
SDP Commitments & Reviews	\$60.00/hour
Writs of Apprehension (G.L. c. 123, § 12(e))	\$50.00/hour
Commitment for Alcohol- or Substance-Abuse (G.L. c. 123, § 35)...	\$50.00/hour
Concurrent felonies:	
If substantive case heard in Superior Court	\$60.00/hour
If substantive case heard in District Court	\$50.00/hour
Children and Family Law cases, including CHINS	\$50.00/hour
Mental Health Cases	\$50.00/hour
Other Criminal Cases not mentioned above	\$50.00/hour

34. Docket Entry and Documentation Requirements

Attorney bills are subject to review by CPCS, and attorneys may be asked to provide docket sheets and other records on individual cases.

Committee for Public Counsel Services
Assigned Counsel Manual
Policies and Procedures

VI. COURT COSTS OF INDIGENT PERSONS FUND
G.L. c. 261, §§ 27A-G

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A. INTRODUCTION

Zealous advocacy often requires incurring expenses in preparing and presenting a client's case. For example, it may be advisable to obtain an expert witness or an interpreter to assist in witness interviews, or a blood analysis. Attorneys should familiarize themselves with G.L. c. 261, §§ 27A-G, which provide for payment of expenses through the Indigent Court Costs Fund.

1. General Guidelines for Obtaining Funds for Defense Costs

Generally, it is necessary to obtain prior written approval from the judge for expenses, by filing a motion under this statute. The motion must be accompanied by an "*Affidavit of Indigency and Request for Waiver, Substitution or State Payment of Fees & Cost*" form

(http://www.mass.gov/courts/formsandguidelines/aff_indigency.pdf)

and, if necessary, a "*Supplement to Affidavit of Indigency*" form

(http://www.mass.gov/courts/formsandguidelines/supp_aff_indigency.pdf),

both as issued by the Supreme Judicial Court, or, if acceptable to the particular court, a Notice of Assignment of Counsel (NAC) form and a supporting affidavit of counsel. Counsel should research the law and prepare an argument for hearing before the judge on this motion; if the motion is denied, the attorney should appeal the motion to either the Appellate Division of the District Court, the Superior Court, or the Appeals Court, depending on which court has jurisdiction (see G.L. c. 261, § 27D). **This notice of appeal must be filed within seven days.** Counsel should not engage the services of an expert or incur other expenses until s/he has received written court approval for the requested funds under this statute, except as described below. Attorneys are required to verify work performed by experts, investigators and social service providers by signing and dating the expert's payment voucher, indicating the NAC number, and adding the following language: "I certify that the expert or provider who submitted this bill has provided services in this case."

Please note that attorneys may not receive any personal or professional benefit from selecting or using an expert. An expert should be selected by the attorney based upon the expert's qualifications and suitability for the case. For assistance in obtaining the names of qualified experts, contact the appropriate panel at CPCS, the Forensic Services Director of CPCS, or check the CPCS website.

A Sample motion and Affidavit in Support can be found at the end of this Section. Information regarding payment can be found in section D, below.

2. Unusual or Extraordinary Expenses

When attorneys seek unusual or extraordinary expenses, they must first obtain prior written authorization from the appropriate Deputy Chief Counsel. (See Chapter 5, Section 29, of this Manual.) After receiving the required written authorization from the appropriate Deputy Chief Counsel, the attorney must **also** obtain prior written approval from the judge as outlined in paragraph #1 above.

Some examples of unusual or extraordinary expenses are:

- a. Expenses required to obtain the services of an expert whose rates exceed the range of CPCS published rates, see “CPCS Qualifications and Rates for Investigators, Social Service Providers and Expert Witnesses” in the appendix to this chapter.
- b. Expenses for an expert whose qualifications do not meet the “CPCS Qualifications and Rates for Investigators, Social Service Providers and Expert Witnesses” in the appendix to this chapter.
- c. Expenses involving unusual expertise, services, or products.

3. Ordinary Costs of Litigation

Please note that for certain ordinary costs of litigation, attorneys may not need to file a motion for expenses under G.L. c. 261, §§ 27 A-G, or obtain prior authorization from the appropriate Deputy Chief Counsel of CPCS. For example, attorneys need not file a motion or obtain prior authorization for the following:

- a. interpreter services not exceeding \$500, paid at the standard rate
- b. transcripts for direct appeals, regardless of cost, paid at the standard rate
- c. other transcripts under \$1,000, paid at the standard rate
- d. service of process

4. New Trial Motions

Any request for funds in connection with a motion for new trial pursuant to Mass. R. Crim. Pro. 30 (c) is not within the scope of G.L. c. 261, §§ 27A-G, but should instead be made pursuant to Rule 30 itself.

5. Appellate Review of Denial of Motion for Funds (G.L. c. 261, § 27D)

After notice of the denial, **a notice of appeal must be filed within seven days.** This notice of appeal must be filed in the office of the clerk of the court which heard the motion.

A stay of proceedings pending appellate resolution of the funds issue should also be requested.

The judge must file written findings concerning his denial of the motion within three days of receiving the notice of appeal.

The clerk will forward the motion and findings to the single justice of the Appeals Court if the motion was denied in Superior Court, to the Appellate Division of the District Court if the motion was denied in District Court, or to the Superior Court if the motion was denied in Juvenile Court. A hearing of the appeal will be scheduled by the clerk of the applicable appellate forum.

SAMPLE MOTION FOR EXPENSES

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

SUPERIOR COURT DEPARTMENT
Docket No.

COMMONWEALTH

v.

[CLIENT]

MOTION FOR EXPENSES

Now comes the defendant [or client] in the above-entitled matter and moves this Court, pursuant to G.L. c. 261, § 27C, to authorize the expenditure of funds not to exceed five hundred dollars (\$500) to retain John Doe, a fingerprint expert.

The defendant [or client] states that the requested funds are "reasonably necessary to assure [him] as effective a ... defense as he would have if he were financially able to pay." G.L. c. 261, § 27C(l); *Commonwealth v. Bolduc*, 383 Mass. 744, 748 (1981); *Commonwealth v. Lockley*, 381 Mass. 156, 164 (1980).

[CLIENT]
By his attorney:

[Attorney Name]

SAMPLE AFFIDAVIT IN SUPPORT OF MOTION FOR EXPENSES

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
Docket No.

COMMONWEALTH

v.

[CLIENT]

MOTION FOR EXPENSES

AFFIDAVIT IN SUPPORT OF MOTION FOR EXPENSES

I, [Attorney Name], depose and say that:

I. Defendant [or client] was found indigent by a justice of the Suffolk Superior Court at his arraignment on [Date]. The defendant remains indigent and has no funds to engage the services of a fingerprint expert. [or]

1. Defendant [or client] is indigent as indicated in his "*Affidavit of Indigency and Request for Waiver, Substitution or State Payment of Fees & Cost*" and "*Supplement to Affidavit of Indigency*," filed herewith.

2. John Doe is a qualified expert. I have discussed with him the issues in this case, and he has advised me that the cost of analyzing the fingerprint evidence and preparing a report will be five hundred dollars (\$500.00). Additional funds will be needed to compensate him for his time if it becomes necessary for him to appear in court.

The above is true to the best of my information and belief and is signed under the pains and penalties of perjury.

[Attorney Name]

B. EXPERT ISSUES IN REPRESENTING INDIGENT PERSONS

Statutory provisions for the payment of fees and costs on behalf of indigent persons are found in G.L. c. 261, §§ 27A-G. In order to obtain funds, it must be shown that:

1. The person is indigent. This can be established by filing an "*Affidavit of Indigency and Request for Waiver, Substitution or State Payment of Fees & Cost*" form

(http://www.mass.gov/courts/formsandguidelines/aff_indigency.pdf)

and, if necessary, a "*Supplement to Affidavit of Indigency*" form

(http://www.mass.gov/courts/formsandguidelines/supp_aff_indigency.pdf),

both as issued by the Supreme Judicial Court. In some courts, an assertion by affidavit of counsel that s/he was appointed upon a previous finding that the person was indigent will suffice; and

2. The requested expenses are "reasonably necessary to assure the applicant as effective a ... defense ... as he would have if he were financially able to pay." G.L. c. 261, § 27C(4).

"The test is whether the item is reasonably necessary to prevent the party from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires."

Commonwealth v. Lockley, 381 Mass. 156, 160-161 (1980).

To obtain authorization for the payment of an expert, a written motion must be filed which should state the amount of money needed, the purpose of the expenditure, and why the expenditure is "reasonably necessary." In criminal cases, the motion must be accompanied by an affidavit detailing the "facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion." Mass. R. Crim. P. 13(a)(2). Although the authorizing statute provides that the court "shall not deny any request with respect to extra fees or costs if it finds the document, service or object is reasonably necessary" (and "shall not deny any request without first holding a hearing thereon"), G.L. c. 261, § 27C(4), appellate courts have scrutinized affidavits in this context and have on occasion found them inadequate.

In order to make the necessary representations in the affidavit concerning costs of services, a preliminary discussion with a potential expert may be desirable.

A Sample motion for Expenses and Affidavit in Support regarding payment can be found above.

EX PARTE MOTION

Counsel should ask that a motion for funds be allowed without a hearing or, if a hearing is necessary, that it be conducted *ex parte*. Where the "reasonable necessity" of the funds sought is established in the motion or affidavit in support of the motion, the court should allow the motion without a hearing. Where a hearing is necessary, however, the court should hear the matter on an *ex parte* basis in order that counsel need not disclose key aspects of his or her case. *Cf. Comm. v. Dotson*, 402 Mass 185, 521

N.E.2d 395 (1988) (prosecution has no role to play in defendant's motion for public payment for expert witness under G.L. c. 261, § 27C). An *ex parte* motion remains a part of the public record of a case unless the motion is impounded. Therefore, counsel should move to impound the motion.

CAUTION: The information gathered and the opinions formed by an expert “belong” to the client and are not discoverable by opposing counsel (or to be shared with the court) unless the expert will be called by counsel to testify or the expert’s report, if any, will be proffered at the hearing. *Thompson v. Commonwealth*, 386 Mass. 811, 819, 438 N.E.2d 33, 38 (1982) (facts known and opinions held by independent physician to be treated the same as if physician had been hired privately); *Commonwealth v. Haggerty*, 400 Mass. 437 at 441(1987). The court should not draw any adverse inferences from the respondent's decision not to use the report as evidence in his or her case.

C. INFORMATION ON SELECTED ICC SERVICES

1. Interpreters

The Committee pays for interpreter OUT-OF-COURT services which have been requested and allowed by motion (except as set out below in this section) filed by the defense attorney on behalf of an indigent client, at the rate of \$26 per hour for non-certified interpreters and \$40 per hour for certified and qualified interpreters.

A certified interpreter is one trained and certified by the Office of Court Interpreter Services. A qualified interpreter is one certified by the Office of Court Interpreter Services and who has passed the Administrative Office of the U.S. Courts Federal Certification Examination or a sign language interpreter as determined by the Massachusetts Commission for the Deaf and Hard of Hearing.

Requests for compensation of services should be submitted to the Committee for Public Counsel Services, Indigent Court Cost Department, by the interpreter on a signed payment voucher form which includes an itemization of dates, hours, type of services and rate, and a copy of the allowed motion, within 30 days of completion of services.

No motion for expenses is required for interpreter services under \$500. For interpreter services over \$500, attorneys must follow the “General Guidelines for Obtaining Funds for Defense Costs,” outlined in Section A 1, above.

CPCS will compensate interpreters a minimum of two hours of services for each event for which their services are required. For example, if an interpreter is needed to interview a client at his residence, and the interpreter’s combined travel time and interview time are only one hour, the interpreter will be compensated for a total of two hours of service. If the interpreter’s travel time is one hour and the interview time is one hour, the interpreter will be compensated for one hour of travel and one hour of service, totaling two hours. If the interpreter’s combined travel and interview time is three hours, the interpreter will be compensated for a combined total of three hours of service.

Interpreters will be compensated for their travel time, mileage, and expenses in accordance with the CPCS travel policy for all vendors.

To obtain reimbursement in excess of the ordinary rate for interpreter services, if such reimbursement is needed for a language for which interpreter services are not readily available, attorneys must first obtain prior written authorization from the appropriate Deputy Chief Counsel. (See Chapter 6, Section A. 2, "Extraordinary or Unusual Expenses.") After receiving the required written authorization from the appropriate Deputy Chief Counsel, attorneys must **also** obtain a prior allowed motion from the court, pursuant to G.L. c. 261, §§ 27A-D.

Interpreters for the Deaf and Hard of Hearing

CPCS will pay interpreters for the deaf and hard of hearing in accordance with the rate structure established by the Massachusetts Commission for the Deaf and Hard of Hearing (MCDHH). See the MCDHH website for rates paid to interpreters for the deaf and hard of hearing: <http://www.mass.gov/MCDHH/>.

2. Transcripts

The Committee pays for transcriptions, which have been requested and allowed by motion, filed by the defense attorney on behalf of his/her indigent client, or which have been requested by the court as a direct result of the defense attorney's motion to appeal, at the following rates:

Transcripts from notes are paid at the rate of \$3.00 per page for an originally produced (first time produced) page and \$1.00 per page for a copy. Transcripts from tapes are paid at the rate of \$3.00 per page, per original and .75 per page for a copy.

Please note: the Committee for Public Counsel will reimburse for one copy only at the above noted copy rate. Additional copies should be limited to only those which are absolutely necessary and should be produced at a photocopying rate (maximum .10 per page). Postage, handling, bindings and travel expenses are not reimbursed.

Requests for compensation of services should be submitted to the Committee for Public Counsel Services, Indigent Court Cost Department, by the transcriber on a payment voucher form which includes the date(s) of the original hearing(s), the date the transcript was delivered, the total number of pages produced, a copy of the allowed G.L. c. 261, §§ 27A-G motion OR the court order to produce the transcript, and proof of indigency (see section on acceptable proofs), within 30 days of completion of services.

Court Reporter Attendance. The Committee will pay for the attendance of a Court Reporter, which has been requested and allowed by motion filed by the defense attorney on behalf of his or her indigent client, at the rate of \$148.48 per day.

Requests for compensation of services must be submitted by the vendor, accompanied by an allowed motion, and should be submitted within 30 days of completion of services.

3. **Public Notice**

The Committee will pay for Public Notices which have been requested by the defense attorney on behalf of his or her indigent client.

A copy of the actual notice or an invoice (showing the name of the newspaper, number of lines, days printed, and rates) and proof of client indigency must be included with the request for payment.

4. **Service and Summons**

Requests for Service and Summons made by the defense attorney on behalf of his or her indigent client will be paid at the rate allowed under G.L. c. 262, § 8. A complete itemization of dates, rates, mileage, party served, proof of indigency and party requesting the service, must be noted on, or attached to, the payment voucher.

Note to attorneys: please be advised that we will reimburse you for costs incurred regarding services and summons up to the amount allowed by G.L. c. 262, § 8, **only**. Please notify your vendor as to the correct billing rate prior to contracting services.

5. **Psychiatric Examination, Medical/Lab Testing, Private Investigators, Expert Witnesses or Expert Analysis**

The Committee will pay for any of the above noted services if they have been requested and allowed by motion filed by the defense attorney on behalf of his or her indigent client, **at an amount not to exceed the allowed motion.**

The attorney is asked to ensure that these services are ones which are reasonably necessary to assure the client as effective a defense as s/he would have if s/he were financially able to pay. Requests for compensation of services must be submitted by the vendor on a payment voucher form, accompanied by an allowed motion pursuant to G.L. c. 261, §§ 27A-G, including an itemization of dates, hours and rates, and submitted within 30 days of completion of services. Lump sum or flat fee billing will be rejected; further itemization will be requested.

D. PAYMENT FROM THE INDIGENT COURT COSTS FUND

The company or person who performed services may submit a Commonwealth Payment Voucher (PV) and be paid directly. If the attorney has already paid the company or person for services, the attorney may submit a PV in order to be reimbursed. Documentation of that payment must accompany the PV.

Documentation Required:

The Comptroller of the Commonwealth requires complete documentation, including all receipts and an itemization of all expenses, in order to reimburse attorneys for **any** expenditures. Legible receipts in the form of a canceled check, or other document that clearly indicates that the bill was paid, and indicating the date, amount of expenses, and name of vendor must be submitted with the attorney's request for payment.

A sample PV form follows, along with instructions for completion. Photocopies of the sample are acceptable for use in billing.

12-1

PAYMENT VOUCHER INPUT FORM

REFUGEE NAME AND ADDRESS

UN: 7PNC5 : AR/DLW11(46)

(9) a.
b.
c.
d.

171(88)

for

hence, people who are personalist or party men all have of the elements of the socializing mechanism in mind. Since most of the regions that have been supplied with and cleaned.

DATE: _____INSTRUCTIONS TO VENDOR:

Payment Voucher (PV) Instructions for Completion

(Numbers on sample form correspond to numbers below.)

The term "vendor" is used below in reference to the person or company seeking reimbursement.

REMINDER: THE COMMONWEALTH'S FISCAL YEAR RUNS FROM JULY 1 THROUGH JUNE 30. PLEASE SUBMIT SEPARATE PVs FOR EACH FISCAL YEAR.

The case name and related assignment number must be noted on the PV and proof of services rendered (each date and description of services on business letterhead), proof of payment for services (canceled check or paid receipt from vendor), Attorney Certification (where applicable), and an allowed motion (where applicable) must be attached.

Attorneys are required to verify work performed by experts, investigators and social service providers by signing and dating the expert's payment voucher after adding the following prescribed language:

"I certify that the expert or provider who submitted this bill has provided services in this case."

1. Vendor's Certification: Requires the original signature of either the provider of the services or the attorney, depending on who is seeking reimbursement.
2. Dept: Will always be CPC
3. Vendor Invoice Number: The first three digits will always be the court code (see Section IX of this Manual.) The next nine digits can be whatever the vendor wants to use as an identification number; usually CPCS attorneys use the nine-digit Notice of Assignment of Counsel number. This number will appear on the check stub.
4. Vendor Code: A vendor code must be established and on file with the Commonwealth before a vendor may be paid. It consists of the social security number and the first four letters of the last name, or a federal income tax identification number and four assigned digits. To establish a vendor code, contact CPCS Private Attorney Payment Department.
5. Vendor Name and Address: Name and address of the person whose vendor code is listed. The Committee must receive written notification of address changes on letterhead with an original signature.
6. Quantity: How many units of work were provided, e.g., hours, copies, etc.
7. Unit Price: Cost per unit, e.g., \$25.00/hour, \$2.50/copy, etc.
8. Amount: Multiply unit price times quantity.
9. Description.
 - a. Client name.
 - b. Court.
 - c. Name of provider of service if different from vendor seeking reimbursement.
 - d. Type of service provided.
 - e. See section on documentation below.
10. Amount: Total reimbursement requested.
11. Dates of Services: Dates when services were actually rendered or delivered (in the case of reports or transcripts). PLEASE SUBMIT SEPARATE PV's FOR EACH FISCAL YEAR. A fiscal year runs from July 1 to June 30.

6-12

After completing the Attorney Verification (where appropriate) forward the packet to:

Committee for Public Counsel Services
Billing Department
44 Bromfield Street
Boston, MA 02108

Documentation

The following documents must be attached in order for a PV to be processed.

- 1 Proof of Indigency: An Affidavit of Indigency, a motion authorizing Commonwealth payment of fees due to client's indigency, or a copy of the Notice of Assignment of Counsel form.
- 2 Proof of Payment: When an attorney requests payment for expenses, monies cannot be advanced. Proof of payment for the service is required. Either a signed receipt or a receipt that CLEARLY shows that the person or company providing the services has been paid PRIOR TO SUBMISSION of the PV is acceptable. A copy of a CANCELED check is recommended.

Reminders:

- Do not seek reimbursement if you have not paid the vendor. Have the vendor bill us directly. In such cases, where appropriate, sign Attorney Verification and send the PV and supporting documentation to CPCS.
- Do not seek reimbursement if someone else paid for the costs. Have him or her bill us directly.
- Do not submit a PV and then include the amount in rate C of an RFP.
- Separate PVs for each fiscal year must be submitted (the appropriations are fiscal year specific).
- Submit your vendor's bill promptly upon completion of vendor's services and your payment of expenses.
- Vendors must keep itemized time sheets.
- Vendors must bill actual time.
- Vendors cannot bill waiting time, except as allowed for in-court waiting time.

**Payment Voucher (PV) forms can be downloaded in PDF format
(Instruction PV and the blank PV are included in PDF format)**

VII. Audit and Oversight Procedures

PREAMBLE

Pursuant to G.L. c. 211D, § 12, the Audit and Oversight Department, hereinafter referred to as "The Department," is responsible for monitoring the billings of private counsel who accept assignments through the Committee and vendors who provide services to CPCS clients. The Department reviews bills to insure that the services billed were provided to the client, that the bills submitted are reasonable in terms of both dollars charged and hours billed and that the attorney/vendor maintains his or her billing records and files in compliance with CPCS billing and record-keeping requirements.

AUTHORITY

The purpose of this chapter is to provide attorneys and vendors with general information regarding the Department's audit procedures. The chapter shall not be interpreted to define, limit or restrict the authority of the Committee through its various departments and staff to examine any and all bills submitted for payment and take all appropriate action with regard to such bill(s).

I. AUDIT PROCEDURE

The following procedure will be followed where irregularities with respect to billings come to the attention of CPCS staff.

A. Preliminary Investigation

1. A preliminary investigation will be undertaken by Audit and Oversight Department staff to (i) ascertain whether the attorney or vendor erred in recording information submitted, over-billed for services provided or otherwise engaged in questionable practice(s), and (ii) determine whether or not there is a pattern of such practice(s) in other invoices.
2. Based upon the results of the preliminary investigation, a decision will be made by the Audit and Oversight Department as to whether or not an audit will be performed. The attorney or vendor will be mailed an "Audit Letter" advising that an audit is being performed.
3. The department may suspend the payment of any bill(s) pending review of same.

B. Audit Letter, Response, Timing

1. Respondent attorney/vendor shall cooperate with the Department's request for information and shall have thirty (30) days, from date of receipt, to respond to the Audit Letter and provide documentation, including but not limited to contemporaneous time sheets, notes, file materials, and other documents requested by the Department.
2. Respondent attorney/vendor shall have one automatic fifteen (15) day extension to respond to the Audit Letter upon written request (not less than five days prior to the 30- day deadline) to the Audit and Oversight Department.

3. Respondent attorney/vendor shall have no further extensions of time to respond to the Audit Letter, except upon written notice of extraordinary circumstances (not less than five days prior to the 45-day deadline). Such requests should contain a description of the circumstances warranting the extension and should be forwarded to the Audit and Oversight Department. Such requests will be allowed at the discretion of the assigned Hearing Officer (see § V. A., below).
4. Respondent attorney/vendor's unclaimed correspondence of any kind shall be deemed received on the date of mailing.

C. Failure to Respond

An attorney/vendor who fails to respond to the Audit Letter shall be subject to temporary suspension from eligibility to accept assignments. In addition, the payment of bills shall be subject to suspension.

1. Suspension of Bill Payments

The Department shall notify the attorney/vendor in writing of its intention to suspend the payment of bills for failure to respond and the attorney/vendor shall have seven (7) days from the date of such notice to avoid suspension by submitting a complete response to the audit.

2. Suspension of Eligibility to Accept Assignments

A Committee member must approve a suspension from eligibility to accept new assignments for failure to respond. The Department shall notify the attorney/vendor in writing of its intention to seek such approval. The attorney/vendor shall be provided seven (7) days from the date of such notice to avoid such suspension by submitting a complete response to the audit.

3. Duration of Suspension

Any suspension for failure to respond shall remain in effect until a complete response to the audit is received.

4. Waiver

In the event the attorney/vendor fails to respond within thirty (30) days following the suspension date, the Department may proceed with the audit and the attorney/vendor shall be deemed to have waived his or her right to respond, to submit a written Rebuttal or to request a hearing as provided herein.

II. DISPOSITION RECOMMENDATION

At the conclusion of the audit process, Audit and Oversight Department staff shall prepare a written Disposition Recommendation containing findings and recommendations. Recommendations may include:

- that no action be taken;
- that the bill(s) in question be disallowed;
- that the attorney/vendor be required to repay monies to the Commonwealth;

- that the attorney/vendor be suspended or removed from all Committee panels for a period of time or permanently;
- that the Committee submit the findings to the Board of Bar Overseers;
- that the Committee submit the findings to the Attorney General's or District Attorney's office;
- that the Committee pursue all available civil remedies for the recovery of overpaid funds; or
- other appropriate action.

III. RESPONSE TO DISPOSITION RECOMMENDATION

A. Respondent attorney/vendor who responded to the Audit Letter as provided in § (I)(B)(1) shall have ten (10) days from the date of receipt of the Disposition Recommendation to notify the Department in writing that he or she disputes the recommendation by filing a:

- (1) request for a hearing
- (2) notice of intent to submit a written Rebuttal; or
- (3) notice of intent to submit a written Rebuttal and request for a hearing.

B. Respondent attorney/vendor shall have thirty (30) days from the date of receipt of the Disposition Recommendation for submission of a Rebuttal.

C. Respondent attorney/vendor who fails to timely dispute the Disposition Recommendation as provided in (A) and (B) above shall be deemed to have waived that right.

D. Respondent attorney/vendor who failed to respond to the Audit Letter shall be deemed to have waived his or her right to submit a Rebuttal or request a hearing.

E. Respondent attorney/vendor's Rebuttal to the Disposition Recommendation shall be in the form of and limited to a written statement signed by the attorney/vendor specifically addressing the issues raised in the Disposition Recommendation. No other documentation or evidence shall be introduced.

F. The Disposition Recommendation and attorney/vendor's Rebuttal will be forwarded to the Hearing Officer for review. If a hearing has been requested the attorney/vendor will be notified in writing of the date, time and location of the hearing. If no hearing has been requested, the attorney/vendor will be notified of the Hearing Officer's decision, in writing, within sixty (60) days.

IV. SETTLEMENT OF CLAIMS

The Department and attorney/vendor may at any time discuss settlement of an audit. In the event that a settlement is negotiated, the parties shall submit a proposed decision in the appropriate form for the Hearing Officer's approval. The Hearing Officer may accept, reject or recommend modifications to the proposed agreement. Notwithstanding the agreement of the Department and the attorney/vendor, no settlement shall be binding upon either party until approved in writing by the Hearing Officer.

V. HEARINGS

A. Hearing Officers

Any of the fifteen (15) members of the Committee for Public Counsel Services may serve as a Hearing Officer.

B. Scheduling of Hearings

1. The Audit and Oversight Department shall schedule a hearing within sixty (60) days from receipt of the Respondent attorney/vendor's written request.
2. The Audit and Oversight Department and the Respondent attorney/vendor shall each have one automatic continuance of the hearing not to exceed 15 days from the scheduled hearing date: (a) upon written request to the Hearing Officer; (b) a copy to opposing party; and (c) not later than seven (7) days prior to the scheduled hearing.
3. The Audit and Oversight Department and the Respondent attorney/vendor shall have no further continuances of the hearing except in extraordinary circumstances: (a) upon written request to the Hearing Officer; (b) a copy to the opposing party; and (c) allowed by the assigned Hearing Officer.

C. Burden of Proof

At the hearing, the burden of proof shall be upon the Respondent.

D. Standard of Review

All hearings shall be conducted under the abuse of discretion standard of review.

E. Evidence

1. At the Hearing, the evidence shall consist of the: (a) Audit Letter(s); (b) Documentation and Response to Audit Letter(s); (c) Disposition Recommendation; and (d) Written Rebuttal.
2. Respondent attorney/vendor and Audit and Oversight Department Counsel or his or her designee shall each be limited to a 30-minute oral argument. Either party may waive oral argument.
3. Respondent attorney/vendor and Audit and Oversight Department Counsel or his or her designee shall limit oral argument to the issues raised in either the (a) Audit Letter(s); (b) documentation and response to Audit Letter(s); (c) Disposition Recommendation; and (d) Written Rebuttal.
4. The Respondent attorney/vendor and Audit and Oversight Counsel shall not introduce new evidence or documentation at the hearing.
5. Respondent attorney/vendor may be represented by counsel, but shall be limited to one oral argument.

F. Recording of Proceedings

The attorney/vendor may at his or her own expense hire a stenographer to record the proceedings provided: (1) the Department is sent written notice of such intent seven days prior to the hearing and (2) the attorney/vendor provides a copy of the transcript to the Department. No other form of recording shall be permitted.

VI. DECISIONS OF HEARING OFFICERS

A. The Hearing Officer may approve, reject, or modify the Recommendation, or take any other appropriate action.

B. The Hearing Officer shall have the discretion to decide any case by written decision with or without findings of fact. The parties may submit a proposed decision to the Hearing Officer.

C. The Hearing Officer shall present to the Executive Committee for approval and ratification on the record only that part of any decision which includes removal from Committee Panels or referral to the Board of Bar Overseers, Attorney General, or District Attorney

D. In the event of a decision that there has been a violation of a Disciplinary Rule or a criminal law, the Committee shall submit its findings with specific references to any pertinent disciplinary rule or criminal law to the Board of Bar Overseers; and its findings with specific references to any pertinent criminal law to the Attorney General or the appropriate District Attorney.

E. The Hearing Officer shall render a decision within sixty (60) days of receipt of the recommendation from the Department or hearing and forward that decision to the Deputy Chief Counsel for the Private Counsel Division for notification to the Respondent and the Department.

F. The decision of the Hearing Officer shall constitute the final decision of the agency.

VII. SUSPENSION, REMOVAL, FAILURE TO COMPLY AND RE-PAYMENT

A. The Audit and Oversight Department shall suspend from all panels, suspend the payment of all bills, and/or refer to appropriate agencies all attorney/vendors who fail to comply with the decision of the Hearing Officer. Prior to any such suspension and/or referral, the Department shall notify the attorney/vendor in writing of the particulars of non-compliance and the attorney/vendor shall be granted ten (10) days to remedy said non-compliance.

B. Any attorney/vendor suspended pursuant to a decision of the Hearing Officer or for failure to comply with such decision shall not be eligible for reinstatement until the amount then due and owing has been paid in full.

C. Any attorney/vendor removed from panels pursuant to a decision of the Hearing Officer shall not be eligible to apply for reinstatement until the amount assessed for over-billings has been paid in full.

D. The Committee makes assignments to individuals and not firms. However, the Committee makes payments to individuals or firms. In the event that the Committee has been over-billed, the individual and firm are jointly and severally liable for repayment of amounts over-billed.

VIII. AUDIT AND OVERSIGHT PREPAYMENT AUDITS

A. In addition to the audits described above, audits may be performed of one or more bills prior to submitting such bill(s) to the Comptroller for payment. Such audits shall be referred to as "pre-payment audits." The Department shall notify the attorney/vendor that such audit is being performed and the attorney/vendor shall respond to the Department's request for time sheets, billing records, file materials and other documents within 30 days of receipt of such written request.

B. In addition to the documents requested, the attorney vendor may provide such additional documents as he or she desires as well as a written signed statement setting forth any facts he or she believes to be relevant to a fair review of the work performed and bill submitted.

C. An attorney/vendor who fails to timely respond to the request for information shall be deemed to have waived that right and such bill(s) shall not be paid.

D. The attorney/vendor will be provided a written statement regarding the action taken with respect to the bill. This action may include that the bill will be: (1) paid in full, (2) reduced, (3) disallowed, or (4) further action in accordance with the procedures herein. Such action as provided in (1) through (3) shall constitute the final decision of the agency.

E. The procedures provided in this section VIII are expressly limited to prepayment audits performed by the Department.

Appendix A

INTEREST RATE POLICY

1. The Committee for Public Counsel Services shall impose interest on all audit assessments that are not paid within 30 days of the Hearing Officer's decision.
2. The interest rate shall be 10% annually, calculated at the periodic rate of .008333...% per month.
3. The interest rate shall be reviewed from time to time and adjusted upon approval by the Full Committee.
4. This policy shall take effect July 1, 1997 upon all audits commencing on or after that date.
5. The Committee for Public Counsel Services staff shall be authorized to develop and propose additional procedures for the implementation of this policy.
6. The Audit and Oversight Subcommittee shall review all proposed procedures and present them to the Full Committee for its prior approval.
7. Amounts assessed paid in full within 30 days of the Hearing Officer's decision will be amortized over a period not to exceed two years (24 months). However, the Hearing Officer(s) shall retain the right to modify the two-year amortization period.
8. Interest shall be computed on the remaining unpaid balance at the approved rate(s) of interest in effect at the time the Disposition Recommendation is dated. The interest rate in effect for a particular audit shall not increase or decrease from the rate in effect on the day that the Disposition Recommendation is dated.
9. An amortization schedule shall be provided to each attorney/vendor. The amortization schedule will represent the payment schedule.
10. Attorneys/vendors must at least pay the monthly amount due on or before the payment dates appearing on the amortization schedule.
11. Attorneys/vendors may pay the entire remaining unpaid balance (plus accrued interest) at any time by requesting a payoff amount from the CPCS audit staff.
12. Attorneys/vendors agree to abide by all of the Committee's interest rate policies and procedures.
13. Attorneys/vendors will not receive annual statements of interest paid, unless requested in writing. Audit staff shall be given 60 days from the date the written request is received to comply with such requests. Such statements of interest paid shall be in the form of updated amortization schedules.

VIII. OFFENSE CODES

Offense codes sorted by Description

<u>Code</u>	<u>Chap.</u>	<u>Section</u>	
801	94C	32 32(a)	POSSESSION CLASS A W/INT TO DIS/MGF
806	94C	32 32(b)	MFG/DISTRIB/DISPENS CLASS A
833	94C	32 32(c)	MFG/DISTRIB/DISPENSE CLASS A SUBSEQUENT
802	94C	32A 32A(a)	POSSESSION CLASS B W/INT TO DIS/MFG
807	94C	32A 32A(b)	MFG/DISTRIBUTE/DISPENSE CLASS B
834	94C	32A 32A(c)	MFG/DISTRIBUTE/DISPENSE CLASS B SUBSEQUENT
S42	265	13l	A & B ON EMT
653	265	13j	A&B BODILY INJURY TO CHILD
616	265	15A	A&B DANG WPN VICTIM 65+ SUBSQ
652	265	13j	A&B SUBSTANTIAL INJURY TO CHILD
615	265	15A	A&B W/DANG. WPN., VICTIM 65+
162	90	22B	ABANDONING A MOTOR VEHICLE
657	119	39	ABANDONMENT OF CHILD-CRIMINAL
S95	94c	32k	ABETTING MINOR TO SELL DRUG
1005	112	12S	ABORTIONS
972	274	4	ACCESSORY AFTER THE FACT
971	274	2	ACCESSORY BEFORE FACT
014	273	12	ADJUDICATION OF PATERNITY
936	138	16	ADULTERATION OF ALCOHOLIC BEVERAGE
S62	272	14	ADULTERY
400	CL	1	AFFRAY
631	265	22	AGGRAVATED RAPE
155	90	13	ALLOWING A MV TO REMAIN UNATTENDED
935	131	82	ALLOWING DOG TO INTERFERE W/ DEER
153	90	12	ALLOWING IMPROPER PERSON OP. M/V
S67	140	131I	ALTER I.D. CARD
168	266	139	ALTERING MOTOR VEHICLE ID NUMBERS
102	266	112	ANIMAL, MAIM,KILL,POISON
624	265	18	ARMED ASS. W/INT ROB/MUR 65+
625	265	18	ARMED ASS.INT.ROB/MUR 65+ SUBSQ
626	265	18A	ARMED ASSAULT IN A DWELLING
623	265	18	ARMED ASSAULT W/INT TO ROB MURDER
200	266	14	ARMED BURGLARY & ASSAULT ON OCC.
622	265	17	ARMED ROBBERY
621	265	17	ARMED ROBBERY WHILE MASKED
604	265	13A	ASSAULT
617	265	15A	ASSAULT & BATTERY BY DANG. WEAPON
609	265	13D	ASSAULT & BATTERY ON POLICE
605	265	13A	ASSAULT AND BATTERY
620	265	15B	ASSAULT BY DANGEROUS WEAPON
619	265	15B	ASSAULT DANG.WPN, VICTOM 65+ SUBS
S18	159	104	ASSAULT ON BUS DRIVER ETC.
618	265	15B	ASSAULT W/DANG. WPN., VICTIM 65+
611	265	14	ASSAULT W/INT TO MAIM WITH INJ.
638	265	24	ASSAULT W/INTENT TO RAPE A CHILD
637	265	24	ASSAULT W/INTENT TO RAPE, SUBSQ.
S09	265	29	ASSAULT WITH INTENT TO COMMIT FELONY
S08	265	15	ASSAULT WITH INTENT TO KILL
613	265	15	ASSAULT WITH INTENT TO MAIM
614	265	15	ASSAULT WITH INTENT TO MURDER
636	265	24	ASSAULT WITH INTENT TO RAPE
608	265	13D	ASSAULT&BATTERY ON PUBLIC SERV.
639	265	24B	ASSLT.W/INT.RAPE CHILD,DEF.18+,2D
S30	268	28	ATT DELIV C/S TO INMATE
204	266	16	ATT. TO DAMAGE DEPOS OF VALUABLES
335	266	139	ATT. TO SELL MV W/ALTERED NUMBERS

Offense codes sorted by Description

<u>Code</u>	<u>Chap.</u>	<u>Section</u>	
I19	90	23	ATTACHING PLATES TO M/V
S33	268	15	ATTEMPT RESCUE OF PRISONER
S07	266	5A	ATTEMPT TO BURN BUILDING
S46	265	16	ATTEMPTED MURDER/NO ASSAULT
S80	266	5A	ATTEMPTING ARSON
969	274	6	ATTEMPTING TO COMMIT CRIME
S13	265	25	ATTEMPTING TO EXTORT BY THREAT
S36	268	17	ATTEMPTING TO RESCUE A PRISONER
1027	123	8B	AUTHORIZATION TO TREAT
S81	266	19	B&E RAILROAD CAR
899	276	58	BAIL ONLY
979	276	82	BAIL OR RECOGNIZANCE VIOLATION
900	276	58	BAIL PETITION/APPEAL
209	266	17	BREAK & E DAY INT FEL PERS IN FEAR
207	266	16A	BREAK & E MV, BOAT, BUILD. DAY INT. TO COMMIT MISD.
210	266	18	BREAK & E MV, BOAT, BUILD. DAY , INT. FELONY
206	266	16A	BREAK & E MV, BOAT, BUILD. NIGHT INT. TO COMMIT MISD.
205	266	16	BREAK & E NIGHT MV, BOAT, BUILD, INT. TO COMMIT A FEL.
212	266	20A	BREAK & E TRUCK, INT. TO COMMIT A FELONY
214	266	114	BREAKING GLASS IN A BUILDING
201	266	14	BURGLARY AND ASSAULT IN A DWELLING
501	266	2	BURNING A BUILDING
500	266	I	BURNING A DWELLING HOUSE
502	266	2	BURNING A PUBLIC BUILDING
S71	266	10	BURNING INSURED PROPERTY
504	266	5	BURNING PERSONAL PROPERTY
503	266	2	BURNING THE CONTENTS OF A BUILDING
1001	119	23	CARE & PROTECTION COMM. MOVING APPT. OF GUARDIAN
1016	119	51A	CARE AND PROTECTION
651	265	21a	CARJACKING
703	269	10(AD	CARR. FIREARM W/O LIC., SUBSQ.
962	269	10(B)	CARRYING A DANGEROUS WEAPON
963	269	10	CARRYING DANG. WEAPON, SUBSQ. OFF.
702	269	10(A)	CARRYING FIREARM W/O LIC.
964	269	13	CAUSING A FALSE FIRE ALARM
134	A4	19	CHANNELIZING ISL. VIOL.
1002	210	3	CHILD WELFARE AND ADOPTION
1008	119	39E	CHINS
181	12	12	CITY ORDINANCE-CURFEW VIOLATION-LOWELL CT. ONLY
1003	123	7,8	CIVIL COMMITMENT
647	265	37	CIVIL RIGHTS VIOLATION, ATTEMPT
649	265	37	CIVIL RIGHTS VIOLATION, BODILY INJ
648	265	37	CIVIL RIGHTS VIOLATION, NO BODILY
1022	123	15E	COMMIT AFTER GUILTY FIND
1023	123	16B	COMMIT OF CRIM DEFEND
1025	123	18	COMMIT OF INMATE
1026	123	9a	COMMITMENT APPEAL
1018	123	35	COMMITMENT OF ALCOHOLICS
1004	123	9B	COMMITMENT REVIEW
1019	201	6A	COMMITMENT/GUARDIANSHIP OF MENTALLY RETARDED
S21	279	5	COMMON LAW CRIMES
965	269	14	COMMUNICATING FALSE BOMB REPORT
S70	266	27A	CONCEAL M/V DEFRAUD INS.
970	CL	2	CONSPIRACY
832	94C	40	CONSPIRACY VIOLATE NARCOTICS
916	119	63	CONTRIBUTING TO DELINQ. OF CHILD

Offense codes sorted by Description

<u>Code</u>	<u>Chap.</u>	<u>Section</u>	
S90	94C	32J	CONTROLLED SUBSTANCE IN SCHOOL ZONE
S15	268A	2	CORRUPT GIFTS TO OFFICIAL ETC
817	94C	32G	CREATING/DIST. COUNTERFEIT SUBST.
1011	994	1	CRIM CONTEMPT PROB CT
S52	272	77	CRUELTY TO ANIMAL
203	266	16	DAMAGING A DEPOSITORY OF VALUABLES
898	276	58A	DANGEROUSNESS HEARING
S83	266	97	DEFACING COUNTY BLDG
302	140	12	DEFRAUDING A COMMON VICTUALLER
301	140	12	DEFRAUDING AN INNKEEPER
1020	19B	7	DISABLED PERSONS
105	221	41	DISBARRED/UNAUTHORIZED ATTORNEY SOLICIT BUSINESS
927	131	58	DISCHARGING WPN NR HIGHWAY DWELL
708	269	12E	DISCHRG FIREARM W/IN 500' OF BLDG.
S02	268	34	DISGUISE TO OBSTRUCT JUSTICE
135	A4	20	DISOBEYING TRAFFIC SIG.
401	272	53	DISORDERLY PERSON
103	268	13c	DISRUPTION OF COURT PROCEEDING
S11	272	28	DISSEMINATION OF HARMFUL MATTER TO A MINOR
S89	94C	32F	DIST DRUGS TO MINOR
S53	272	40	DIST SCHOOL ASSEMBLY
402	272	53	DISTURBING THE PEACE
667	138	34	DRINKING IN PUBLIC-ALONE MINOR ONLY-OK ADULT WITH OTHER CHRG
S86	94C	32I	DRUG PARAPHERNALIA
S87	94C	32I	DRUG PARAPHERNALIA TO JUV
888	N/A	N/A	DUTY ATTORNEY (SURRENDER AND CONTEMPT HEARINGS)
S05	272	7	EARNINGS OF PROSTITUTION
1014	9999	99	ELDERLY ABUSE
211	266	18	ENT W/O BK.NIGHT DWEL. INT FEL
213	266	20A	ENT.W/O BK, TRUCK,INT.TO COM.FELONY
208	266	17	ENT.W/O BRK. NIGHT,INT. FEL, IN FEAR
S63	272	4	ENTICING TO UNLAWFUL SEX INTERCOURSE
S28	127	83C	ESCAPE FROM PRISON
406	127	49	ESCAPE FROM WORK RELEASE
303	159A	16	EVADING TAXI FARE
177	123	16A	EVAL OF NGI OR NOT COMP. DEF
106	120	17	EXTENSION HEARING
S16	151A	47	FAIL PAY CONTR DES ECT.
170	89	2	FAIL. KP. LFT. OF VEH. TRAV. IN SAME DIRECT.
172	89	4B	FAIL. TO DR. LANE NEAREST TO RT.
148	89	7A	FAIL. TO DR. RT. ON APPR. OF FIRE
171	89	4	FAIL. TO KEEP RIGHT VIEW OBST.
169	89	1	FAIL. TO KEEP RIGHT WHEN MEETING M/V
174	89	8	FAIL. TO YIELD AP.R.FRM.RT
173	89	8	FAIL. TO YIELD TO VEH.APR.FR.OPP.D.
933	131	71	FAILING COMPLY COLOR REQ.
123	90	31	FAILING TO DIM LIGHTS IN M/V
905	90B	3	FAILING TO DISPLAY ID # ON M/B
107	90	6	FAILING TO DISPLAY PLATES
945	140	137	FAILING TO LICENSE A DOG
946	140	168	FAILING TO RESTRAIN A DOG
150	90	7AA	FAILING TO RESTRAIN CHILD, OP. M/V
167	90	32C	FAILING TO RETURN LEASED M/V
156	90	14	FAILING TO SLOW AT AN INTERSECTION
115	90	14	FAILING TO STOP FOR A SCHOOL BUS

Offense codes sorted by Description

<u>Code</u>	<u>Chap.</u>	<u>Section</u>	
122	90	25	FAILING TO STOP FOR POL OP M/V
143	85	36	FAILURE COVER LOAD OF SAND/GRAVEL
166	90	26A	FAILURE RPT.NAME/ADD. CHANGE RMV
S25	276	82A	FAILURE TO APPEAR
151	90	7Q	FAILURE TO COMPLY WITH THE TIRE TREAD
128	A4	2	FAILURE TO KEEP RIGHT
157	90	14B	FAILURE TO SIGNAL STOPPING/TURNING
669	90	7	FAILURE TO WEAR SEATBELT
S84	266	67B	FALSE CLAIM
326	266	37B	FALSE CREDIT CARD \$250 OR LESS
S82	266	67	FALSE ENTRY IN BOOK OF COR
S65	269	13A	FALSE REPORT TO P.O.
012	18	5B	FALSE REPRES. TO DPW TO SEC. SUP.
S34	268	39	FALSE STATEMENT TO POLICE MV THEFT
S49	56	11	FALSIFY MAKING ELECTION PAPER
938	138	34A	FALSIFYING AGE TO PURCHASE ALCOHOL
163	90	24B	FALSIFYING MOTOR VEHICLE DOCUMENT
S66	140	129	FICTITIOUS NAME ON F/A ID CARD
926	131	36	FISHING HUNTING ON POSTED PROP
925	131	11	FISHING WITHOUT A LICENSE
130	A4	9	FL. CARE IN STRT-STOP-TURN
129	A4	7	FOLLOWING TOO CLOSELY
S48	94C	47	FORFEITURE
338	267	1	FORGERY, DATED
337	267	1	FORGERY, UNDATED
S58	272	18	FORNICATION
1013	992	1	FOSTER CARE REVIEW
S69	266	111B	FRAUD INS. CLAIM-MV
S23	276	20A	FUGITIVE FROM JUSTICE
943	138	34B	FUR. FALSE INFO. TO OBTN. LIQ. ID
S14	271	2	GAMING
S37	271	5	GAMING--KEEPING COMMON GAMING HOUSE
1029	996	1	GERIATRIC ROGERS
327	266	37C	GOODS WITH FALSE CREDIT CARD > \$250
217	266	126a	GRAFFITI LAW
1015	201	5	GUARDIANSHIPS
S94	265	43D	HARASSMENT
666	265	18c	HOME INVASION
S50	272	24	HOUSE OF ILL FAME
1012	993	1	HOUSING CONTEMPT
932	131	70	HUNT BY UNLAW MEANS OPEN SEAS
931	131	68	HUNT UNLAW BY ARTIFIC. LIGHT
928	131	59	HUNTING ON COMM LAND NO PERMIT
924	131	11	HUNTING OR TRAPPING NO LICENSE
934	131	80A	HUNTING UNLAWFULLY BY LEGHOLD TRAPS
929	131	65	HUNTING UNLAWFULLY BY M/V
923	131	5	HUNTING, ETC. DURING CLOSED SEASON
S91	138	S2	ILLEGAL ALCOHOL/LIQUOR KEEPING
821	94C	34	ILLEGAL POSS OF CLASS A SUBSQ.
823	94C	34	ILLEGAL POSS. CLASS B SUBSQ.
825	94C	34	ILLEGAL POSS. CLASS C SUBSQ.
820	94C	34	ILLEGAL POSS. OF A CLASS A SUBSTANCE
822	94C	34	ILLEGAL POSS. OF CLASS B SUBSTANCE
824	94C	34	ILLEGAL POSS. OF CLASS C SUBSTANCE
826	94C	34	ILLEGAL POSS. OF CLASS D SUBSTANCE
827	94C	34	ILLEGAL POSS. OF CLASS D, SUBSQ

Offense codes sorted by Description

<u>Code</u>	<u>Chap.</u>	<u>Section</u>	
828	94C	34	ILLEGAL POSS. OF CLASS E SUBSTANCE
829	94C	34	ILLEGAL POSS. OF CLASS E, SUBSQ
S35	268	33	IMPERSONATING POLICE OFFICE
S06	272	17	INCEST
S41	265	13F	INDEC A&B MENTALLY RETARDED PER
607	265	13B	INDECENT A&B CHILD UNDER 14 SUBSQ
610	265	13H	INDECENT A&B ON PERSON 14 OR OVER
606	265	13B	INDECENT A&B, CHILD UNDER 14
975	272	53	INDECENT EXPOSURE
S56	272	4A	INDUCING MINOR PROSTITUTION
S20	270	18	INHAL TOXIC SUBSTANCE, ETC.
176	123	15A	INIT COMPENT EVALUATION
S74	266	129	INJURE PROPERTY AT MCI
659	266	8	INJURY BY FIRE-NEGLIGENT USE
S78	266	98	INJURY TO SCHOOLHOUSE
S19	159	103	INJURY TO TROLLEY CAR ETC.
178	123	15B	INPATIENT COMPT EVAL
S32	268	32A	INTERFERE WITH FIRE FIGHTING OPER
991	276	20	INTERSTATE RENDITION
960	268	13B	INTIMIDATION OF A WITNESS
650	265	37	INTIMIDATION/RACE,COLOR, ETC.
640	265	26	KIDNAPPING
641	265	26A	KIDNAPPING MINOR BY REL. & ENDANG.
642	265	26A	KIDNAPPING OF MINOR BY RELATIVE
180	6	178H	KNOWING FAILURE TO REG/VERIFY REG INFO
830	94C	35	KNOWINGLY BEING PRES HEROIN KEPT
950	186	14	LAND. ATT. POSS. W/OUT JUD. PROC.
953	186	14	LANDL INTERF. W/ANOT. FURN. UTIL.
954	186	14	LANDL. TRANSF. UTIL.PAYMT. W/OUT CONS.
952	186	14	LANDLORD FAILING TO FURN. UTIL.
951	186	14	LANDLORD INTERFERING W/QUIET ENJOY.
831	94C	37	LARC OF CONTR SUB FROM AUTH
S72	266	34	LARCECNY FALSE PRETENCES > 250
323	266	37	LARCENY BY CHECK, DATED
322	266	37	LARCENY BY CHECK, UNDATED
S73	266	34	LARCENY FALSE PRETENSES < 250
306	266	25	LARCENY FROM A PERSON
308	266	25	LARCENY FROM A PERSON 65+, SUBSQ.
307	266	25	LARCENY FROM A PERSON OVER 65
305	266	20B	LARCENY IN A TRUCK
304	266	20	LARCENY IN BLDG SHIP VESSEL RR CAR
324	266	37B	LARCENY OF A CREDIT CARD
315	266	30	LARCENY OF A FIREARM
309	266	28	LARCENY OF M/V OR TRAILER
313	266	30	LARCENY OF PROPERTY \$250 OR GREATER UNDATED
311	266	30	LARCENY OF PROPERTY \$250 OR LESS
312	266	30	LARCENY OF PROPERTY \$250 OR LESS UNDATED
314	266	30	LARCENY OF PROPRTY \$250 OR MORE DATED
179	266	87	LARCENY OF RENTED PROP
063	90	24	LEAVING ACC. SCENE PERS. INJ.
062	90	24	LEAVING ACC. SCENE PROP.DAMAGE
915	90B	8(E)	LEAVING SCENE AFT PERS INJ M/B
914	90B	8(E)	LEAVING SCENE AFT PROP DAM, M/B
976	272	53	LEWD & LASCIVIOUS
974	272	16	LEWD AND LASCIVIOUS COHABITATION
968	270	16	LITTERING

Offense codes sorted by Description

<u>Code</u>	<u>Chap.</u>	<u>Section</u>	
S85	272	68	LOITERING
909	90B	8	M/B RECKLESSLY TO ENDANGER
941	138	34B	MAKE/ETC. FLS. LIQUOR ID.
967	269	14A	MAKING ANNOYING TELEPHONE CALLS
966	269	14A	MAKING OBSCENE TELEPHONE CALLS
509	266	127	MAL. DEST. OF PROP., \$250 OR LESS
508	266	127	MAL. DESTR. OF PROP. OVER \$250
104	266	94	MALICIOUS DESTRUCTION;BOUNDARY,MONUMENTS
603	265	13	MANSLAUGHTER
127	A4	1	MARKED LANES VIOLATION
612	265	14	MAYHEM
MCA	N/A	N/A	MENTOR CRIMINAL APPEAL
M01	N/A	N/A	MENTOR CRIMINAL CASES
MFA	N/A	N/A	MENTOR FLAP APPEAL
MFL	N/A	N/A	MENTOR FLAP CASES
MH1	N/A	N/A	MENTOR MENTAL HEALTH
MSF	N/A	N/A	MENTOR SUPERVISION FLAP
809	94C	32C	MFG/DISTRIB/CULT CLASS D SUB.
810	94C	32D	MFG/DISTRIB/DISP CLASSE SUBSQ
808	94C	32B	MFG/DISTRIB/DISPENS CLASS C SUB.
939	138	34A	MINOR PURCHASING ALCOHOL
944	138	34C	MINOR TRANSPORTING/CARRYING ALCOH.
S17	264	5	MISUSE OF FLAG
MOF	N/A	N/A	MONITORING FLAP ATTY
175	90	20C	MORE THAN FIVE UNPAID PARKING VIOLATIONS
601	265	1	MURDER
602	274	2	MURDER
056	90	24G	MV HOMI. UNDER INFL.LIQ. & NEGL
055	90	24G	MV HOMI. UNDER INFL.OF DRUGS & NEG.
054	90	24G	MV HOMI. UNDER INFL.OF DRUGS,RECKL.
057	90	24	MV HOMI. UNDER INFL.OF LIQ. & REC.
050	90	24G	MV HOMICIDE BY NEGLIGENT OPERATION
053	90	24G	MV HOMICIDE UNDER INFL. LIQUOR
052	90	24G	MV HOMICIDE UNDER INFL. OF DRUGS
101	147	23	NECESSITY OF LICENSE;EXCEPTION
777	N/A	N/A	NO CASE DUTY DAY
904	90B	3	NO NO. CERTIFICATE FOR MOTORBOAT
949	149	148	NON-PAYMENT OF WAGES
670	279	7	NONPAYMENT OF FINES-SENTENCED TO JAIL
011	273	15	NONSUPPORT OF ILLEGITIMATE MINOR CHILD
010	273	1	NONSUPPORT OF SPOUSE
013	273	1	NONSUPPORT OF SPOUSE, MINOR CHILD
S24	273	13	NONSUPPORT WIFE/CHILD CRIM CONTEMPT
300	90	32F	OBTAINING MV FROM LESSOR BY FRAUD
125	A3	1	ONE WAY STREET VIOLATION
152	90	10	OP. A MV W/O OR IN VIOL. OF LEARN.
112	90	11	OP. A MV WITHOUT LICENSE IN POSSESSION
116	90	23	OP. AFTER LIC/REG BEEN SUSP
118	90	23	OP. AFTER LIC/REG REVOKED
117	90	23	OP. AFTER REVOC C90 VIOLATION
908	90B	8	OP. M/B NEGL. AS TO ENDANGER
912	90B	8(C)	OP. M/B NO OBSERVER FOR SKIER
911	90B	8	OP. M/B UNDER INFLUENCE OF DRUG
910	90B	8	OP. M/B UNDER INFLUENCE OF LIQ.
903	90B	3	OP. M/B W/O CERT. NUMBER
114	90	10	OP. M/V CONTRARY TO LIC. RESTRICT.

Offense codes sorted by Description

<u>Code</u>	<u>Chap.</u>	<u>Section</u>	
913	90B	8(C)	OP. MOTORBOAT, NO LADDER FOR SKIER
042	90	24	OP. UNDER INFL. OF LIQ. 3RD OR +
041	90	24	OP. UNDER INFL. OF LIQUOR, 2ND
045	90	24	OP. UNDER INFL.OF DRUGS, 3RD OR +
044	90	24	OP. UNDER THE INFL. OF DRUGS, 2ND
126	A3	1	OP. WRONG WAY AT ROTARY
113	90	11	OP.A MV WITHOUT REGISTR. IN POSSESSION
158	90	16	OP.MV W/STUDDERED TIRES REST.PER.
973	272	16	OPEN AND GROSS LEWDNESS
668	138	34D	OPEN CONTAINER-ALONE MINOR ONLY-OK ADULT WITH OTHER CHARGES
061	90	24	OPER. A M/V NEGLIGENTLY ENDANGER
160	90	16	OPER. A M/V UNNECESSARY NOISE
902	90B	2	OPER./MAINTAIN UNNUMBERED M/B
161	90	19A	OPER./PERM. OVERWEIGHT VEH.
060	90	24	OPERATING A M/V RECKLESSLY
149	90	1B	OPERATING A MOPEL W/O LICENSE
121	90	24I	OPERATING A MV DRINKING ALC.
108	90	7	OPERATING A MV WITH DEFECTIVE EQU.
111	90	10	OPERATING A MV WITHOUT A LICENSE
109	90	7A	OPERATING AN UNINSPECTED MOTOR VEH
124	90	34J	OPERATING AN UNINSURED M/V
110	90	9	OPERATING AN UNREGISTERED M/V
144	85	36	OPERATING M/V WITH LOAD SPILLING
159	90	16	OPERATING MV W/UNNECESSARY SMOKE
040	90	24	OPERATING UNDER INFL. OF LIQUOR
043	90	24	OPERATING UNDER THE INFL. OF DRUGS
S26	90	20	OTHER M/V VIOLATION
901	76	2	PARENT/GUARD. FAILURE SEND CHILD TO SCHOOL
959	268	1	PERJURY
145	85	36	PERMIT OP. OF M/V W/UNCOV. LOAD
146	85	36	PERMIT OP. OF MV W/SPIL. LOAD
907	90B	5G	PERMIT/OPER. M/B W/O LIFE PRES.
154	90	13	PERMITTING IMPEDED OP. OF A MV
S44	265	21	PERSON FEAR PURPOSE STEAL
655	21c	5	PERSON KNOWINGLY VIOLATES HAZARDOUS WASTE LAW
654	21c	5	PERSON UNKNOWINGLY VIOLATES HAZAROUS WASTE LAW
1028	6	178M	PETITION FOR REVIEW OF SEX OFFENDER DESIGNATION
1007	123A	9	PETITIONS FOR RELEASE OR APPEAL FOR SDP
S55	272	6	PLACE FOR PROSTITUTION
S45	265	28	POISONING
S12	272	29A	POSING CHILD NUDE
S40	271	18	POSS LOTTERY OPERATION
705	269	10(C)	POSS SHOTGUN BAR.UND.18" SUBSQ.
804	94C	32C	POSS. CL. D INT.TO DTRB/MFG/CULT
803	94C	32B	POSS. CLASS C SUB. W/INT. DIS/MFG
805	94C	32D	POSS. CLASS E SUB W/INT.TO DIST
700	269	10(H)	POSS. FIREARM W/O FIREARM ID.
800	94C	27	POSS. INST. TO ADMIN. CONTR. SUBS.
930	131	66	POSS. LOADED SHELLS DURING CLOSED SEASON
707	269	10(C)	POSS. OF MACHINE GUN, SUBSQ. OFF.
701	269	10(H)	POSS.FIREARM W/O ID CARD, SUBSQ.
704	269	10(C)	POSS.SHOTGUN, BARREL < THAN 18"
038	272	29C	POSSESS CHILD PORNOGRAPHY FIRST OFFENSE
039	272	29C	POSSESS CHILD PORNOGRAPHY SECOND OFFENSE
948	148	39	POSSESS/SELL/EXPLODE FIREWORKS

Offense codes sorted by Description

<u>Code</u>	<u>Chap.</u>	<u>Section</u>	
658	269	10h	POSSESSING AMMUNITION
334	266	139	POSSESSING MV W/ALTERED NUMBERS
706	269	10(C)	POSSESSION OF A MACHINE GUN
958	266	102A	POSSESSION OF AN INFERNAL MACHINE
329	266	49	POSSESSION OF BURGLARIOUS TOOLS
343	267	12	POSSESSION OF COUNTERFEIT BILLS
328	266	49	POSSESSION OF M/V MASTER KEY
921	130	69	POSSESSION OF UNDERSIZED SHELLFISH
920	130	44	POSSESSION OR SALE OF SHORT LOBSTERS
600	127	38B	PRISONER ASS/A&B ON CORR. OFF.
961	268	16	PRISONER ESCAPING FROM CUSTODY
990	999	999	PROBATION SURRENDER
997	N/A	N/A	PROBATION VIOLATION OR SURRENDER
S54	272	12	PROCURING
977	272	53A	PROSTITUTION
978	272	53A	PROSTITUTION, PAYMENT FOR SEX
S31	268	32	PULL FALSE ALARM ETC.
120	90	24	RACING A MOTOR VEHICLE
632	265	22	RAPE
634	265	22A	RAPE OF A CHILD, DEF. OVER 18, 2ND
635	265	22A	RAPE OF CHILD WITH FORCE
633	265	25	RAPE, SUBSEQUENT OFFENSE
325	266	37B	RECEIVING STOLEN CREDIT CARD
S03	266	28	RECEIVING STOLEN MOTOR VEH.
331	266	60	RECEIVING STOLEN PROP., OVER \$100
330	266	60	RECEV. STOLEN PROP., \$100 OR LESS
1024	123	16C	RECOMMIT OF CRIM DEFEND
131	A4	10	RED LIGHT VIOLATION
165	90	25	REFUSING TO PRODUCE LIC.OR REGIST.
S61	272	75	REMOVE FLAG FROM GRAVE
889	N/A	N/A	REPRESENTING WITNESS
947	140	185A	RESELLING TICKETS W/O LICENSE
015	268	32b	RESISTING ARREST
656	268	32b	RESISTING ARREST
629	265	19	ROB UNARMED VICT 65+ SUBSQ
628	265	19	ROB UNARMED VICTIM 65+
627	265	19	ROBBERY, UNARMED
1009	996	1	ROGERS
1006	123A	5	S D P (SEXUAL DANGEROUS PERSON)
937	138	34	SELL/DELIV. ALCOH. BEV. TO MINOR
336	266	139	SELLING MV W/ALTERED NUMBERS
S39	271	7	SETTING UP AND PROM. LOTTERY
S57	272	5	SEX W/FEEBLE MIND
922	130	75	SHELLFISHING CONTAM AREA NO PERMIT
316	266	30A	SHOPLIFTING BY ASPORTATION
317	266	30A	SHOPLIFTING BY CONCEALING
321	266	30A	SHOPLIFTING BY CONTAINER TAMPERING
318	266	30A	SHOPLIFTING BY PRICE TAG TAMPERING
320	266	30A	SHOPLIFTING OF SHOPPING CART
319	266	30A	SHOPLIFTING, RECORDING FALSE VALUE
S88	272	34	SODOMY
S51	272	8	SOLICITING FOR PROSTITUTE
906	90B	8	SPEED WHILE OPER. A M/B
140	90	17	SPEEDING
1010	995	1	SPRING/SAIKEWICZ
S92	265	43A	STALKING

Offense codes sorted by Description

<u>Code</u>	<u>Chap.</u>	<u>Section</u>	
S93	265	43	STALKING IN V.O.P.O.
S01	265	23	STATUTORY RAPE
132	A4	11	STOP SIGN VIOLATION
218	266	126b	TAGGING
918	130	37	TAKING LOB OR CRABS NO PERM
310	266	28	TAKING MV W/O AUTH STEALING PARTS
333	266	113	TAKING OF CUT TIMBER
919	130	41	TAKING OR SELLING FEMALE LOBSTER
917	130	31	TAKING, ETC. LOBSTER POTS
664	166	42a	TELECOMMUNICATION SERVICE;FRAUD;GREATER THAN \$5000.
662	166	42a	TELECOMMUNICATION SERVICE;FRAUD;LESS THAN \$5000.
222	23	1A	TEST CHARGE
643	275	2	THREATENING TO COMMIT A CRIME
957	265	35	THROW./DROP OBJ. ON PUB. WAY
S04	266	102	THROWING EXPLOSIVE AT PROP.
S79	266	102B	THROWING EXPLOSIVES
956	265	32	THROWING GLASS ONTO PUBLIC WAY
813	94C	32E	TRAFFICKING IN COCAINE
814	94C	32E	TRAFFICKING IN COCAINE SUBSQ.
815	94C	32E	TRAFFICKING IN HEROIN
816	94C	32E	TRAFFICKING IN HEROIN SUBSQ
812	94C	32E	TRAFFICKING IN MARIJ., SUBSQ. OFF.
811	94C	32E	TRAFFICKING IN MARIJUANA
940	138	34B	TRANSFER/ALTER/DEFACE LIQUOR ID
216	266	120	TRESPASS ON LAND, DWELLING, ETC
215	266	117	TRESPASS TO DAMAGE GRASS OR TREES
S75	266	121A	TRESPASSING W/MV
142	85	14B	TRUCK COMMERC. VEHICLE-FLARE VIOL.
1021	111	94C	TUBERCULOSIS COMMITMENT
136	A4	23	U-TURN VIOLATION
630	265	20	UNARMED ASSAULT WITH INTENT TO ROB
202	266	15	UNARMED BURGLARY
661	266	143	UNAUTHORIZED REPRODUCTION AND TRANSFER OF SOUND RECORDINGS
064	90	24	UNAUTHORIZED USE OF A M/V
065	90	24	UNAUTHORIZED USE OF A M/V SUBSQ.
332	266	63	UNAUTHORIZED USE OF A MOTOR BOAT
995	N/A	N/A	UNKNOWN CHARGE
S68	140	122B	UNL. SALE OF AMMUNITION
S38	271	17	UNLAW REG BETS
S47	164	126	UNLAW USE OF GAS
819	94C	33	UNLAWFULLY OBTAINING A CONT. SUBST.
100	140	24	UNLICENSED KEEPERS;INJUNCTION
646	272	35A	UNNAT. ACT W/CHILD UNDER 16, 2ND
S10	272	34	UNNATURAL ACT SODOMY
645	272	35A	UNNATURAL ACT WITH CHILD UNDER SIXTEEN
644	272	35	UNNATURAL ACTS
S43	265	18B	USE OF FIREARM COMM. FELONY
665	265	18b	USE OF FIREARM WHILE COMMITTING FLEONY
663	166	42b	USE OF INSTRUMENT TO FRAUDULENTLY OBTAIN TELECOMMUNICATION
709	269	10C	USE OF MACE OR TEAR GAS IN CRIME
164	90	24B	USING FALSE MOTOR VEHICLE DOCUMENT
141	64E	2	USING HWYS. W/OUT SPEC. FUEL LIC
942	138	34B	USING LIQUOR ID CARD OF ANOTHER

Offense codes sorted by Description

<u>Code</u>	<u>Chap.</u>	<u>Section</u>	
S27	10	30	UTT STATE LOTTERY TICKET
818	94C	33	UTTERING A FALSE PRESCRIPTION
340	267	5	UTTERING A FORGED INSTR. DATED
339	267	5	UTTERING A FORGED INSTR., UNDATED
341	267	10	UTTERING COUNTERFEIT BILL, UNDATED
342	267	10	UTTERING COUNTERFEIT BILLS, DATED
511	266	127A	VANDALISM OF CHURCH ETC, > \$5,000
510	266	127A	VANDALISM OF CHURCH ETC., < \$5,000
955	208	34C	VIOLATION OF RESTRAINING ORDER
507	266	127	WANTON DEST. OF PROP., \$250 OR LESS
506	266	127	WANTON DESTRUCTION OF PROPERTY OVER \$250
660	266	100	WILLFUL DETENTION OF LIBRARY BOOKS
S59	272	73	WILLFUL INJURY GRAVESTONE
505	266	104	WILLFUL INJURY TO DWELLING OR BLDG
897	276	82	WITHDRAWAL OF BAIL REVIEW PETITION
147	89	7	WLF.&MAL. OBST.OF FIRE-POLICE-AMB.
1017	123	12E	WRIT OF APPREHENSION
133	A4	11A	YIELD SIGN VIOLATION

VIII. (CONTINUED)

OFFENSE CODES IN ORDER BY CHAPTER AND SECTION

Offense codes sorted by Chapter and Section

<u>Code</u>	<u>Chap.</u>	<u>Sect.</u>	
180	6	178H	KNOWING FAILURE TO REG/VERIFY REG INFO
1028	6	178M	PETITION FOR REVIEW OF SEX OFFENDER DESIGNATION
S27	10	30	UTT STATE LOTTERY TICKET
181	12	12	CITY ORDINANCE-CURFEW VIOLATION-LOWELL CT. ONLY
012	18	5B	FALSE REPRES. TO DPW TO SEC. SUP.
1020	19B	7	DISABLED PERSONS
654	21c	5	PERSON UNKNOWNLY VIOLATES HAZAROUS WASTE LAW
655	21c	5	PERSON KNOWINGLY VIOLATES HAZARDOUS WASTE LAW
222	23	1A	TEST CHARGE
S49	56	11	FALSIFY MAKING ELECTION PAPER
141	64E	2	USING HWYS. W/OUT SPEC. FUEL LIC
901	76	2	PARENT/GUARD. FAILURE SEND CHILD TO SCHOOL
142	85	14B	TRUCK COMMERC. VEHICLE-FLARE VIOL.
143	85	36	FAILURE COVER LOAD OF SAND/GRAVEL
144	85	36	OPERATING M/V WITH LOAD SPILLING
145	85	36	PERMIT OP. OF M/V W/UNCOV. LOAD
146	85	36	PERMIT OP. OF MV W/SPIL. LOAD
169	89	1	FAIL. TO KEEP RIGHT WHEN MEETING M/V
170	89	2	FAIL. KP. LFT. OF VEH. TRAV. IN SAME DIRECT.
171	89	4	FAIL. TO KEEP RIGHT VIEW OBST.
172	89	4B	FAIL. TO DR. LANE NEAREST TO RT.
147	89	7	WLF.&MAL. OBST.OF FIRE-POLICE-AMB.
148	89	7A	FAIL. TO DR. RT. ON APPR. OF FIRE
173	89	8	FAIL. TO YIELD TO VEH.APR.FR.OPP.D.
174	89	8	FAIL. TO YIELD AP.R.FRM.RT
149	90	1B	OPERATING A MOPED W/O LICENSE
107	90	6	FAILING TO DISPLAY PLATES
108	90	7	OPERATING A MV WITH DEFECTIVE EQU.
669	90	7	FAILURE TO WEAR SEATBELT
109	90	7A	OPERATING AN UNINSPECTED MOTOR VEH
150	90	7AA	FAILING TO RESTRAIN CHILD, OP. M/V
151	90	7Q	FAILURE TO COMPLY WITH THE TIRE TREAD
110	90	9	OPERATING AN UNREGISTERED M/V
111	90	10	OPERATING A MV WITHOUT A LICENSE
114	90	10	OP. M/V CONTRARY TO LIC. RESTRICT.
152	90	10	OP. A MV W/O OR IN VIOL. OF LEARN.
112	90	11	OP. A MV WITHOUT LICENSE IN POSSESSION
113	90	11	OP.A MV WITHOUT REGISTR. IN POSSESSION
153	90	12	ALLOWING IMPROPER PERSON OP. M/V
154	90	13	PERMITTING IMPEDED OP. OF A MV
155	90	13	ALLOWING A MV TO REMAIN UNATTENDED
115	90	14	FAILING TO STOP FOR A SCHOOL BUS
156	90	14	FAILING TO SLOW AT AN INTERSECTION
157	90	14B	FAILURE TO SIGNAL STOPPING/TURNING
158	90	16	OP.MV W/STUDDED TIRES REST.PER.
159	90	16	OPERATING MV W/UNNECESSARY SMOKE
160	90	16	OPER. A M/V UNNECESSARY NOISE
140	90	17	SPEEDING
161	90	19A	OPER./PERM. OVERWEIGHT VEH.
S26	90	20	OTHER M/V VIOLATION
175	90	20C	MORE THAN FIVE UNPAID PARKING VIOLATIONS
162	90	22B	ABANDONING A MOTOR VEHICLE
116	90	23	OP. AFTER LIC/REG BEEN SUSP
117	90	23	OP. AFTER REVOC C90 VIOLATION
118	90	23	OP. AFTER LIC/REG REVOKED
119	90	23	ATTACHING PLATES TO M/V
040	90	24	OPERATING UNDER INFL. OF LIQUOR

Offense codes sorted by Chapter and Section

<u>Code</u>	<u>Chap.</u>	<u>Sect.</u>	
041	90	24	OP. UNDER INFL. OF LIQUOR, 2ND
042	90	24	OP. UNDER INFL. OF LIQ. 3RD OR +
043	90	24	OPERATING UNDER THE INFL. OF DRUGS
044	90	24	OP. UNDER THE INFL. OF DRUGS, 2ND
045	90	24	OP. UNDER INFL.OF DRUGS, 3RD OR +
057	90	24	MV HOMI. UNDER INFL.OF LIQ. & REC.
060	90	24	OPERATING A M/V RECKLESSLY
061	90	24	OPER. A M/V NEGLIGENTLY ENDANGER
062	90	24	LEAVING ACC. SCENE PROP.DAMAGE
063	90	24	LEAVING ACC. SCENE PERS. INJ.
064	90	24	UNAUTHORIZED USE OF A M/V
065	90	24	UNAUTHORIZED USE OF A M/V SUBSQ.
120	90	24	RACING A MOTOR VEHICLE
163	90	24B	FALSIFYING MOTOR VEHICLE DOCUMENT
164	90	24B	USING FALSE MOTOR VEHICLE DOCUMENT
050	90	24G	MV HOMICIDE BY NEGLIGENT OPERATION
052	90	24G	MV HOMICIDE UNDER INFL. OF DRUGS
053	90	24G	MV HOMICIDE UNDER INFL. LIQUOR
054	90	24G	MV HOMI. UNDER INFL.OF DRUGS,RECKL.
055	90	24G	MV HOMI. UNDER INFL.OF DRUGS & NEG.
056	90	24G	MV HOMI. UNDER INFL.LIQ. & NEGL
121	90	24I	OPERATING A MV DRINKING ALC.
122	90	25	FAILING TO STOP FOR POL OP M/V
165	90	25	REFUSING TO PRODUCE LIC.OR REGIST.
166	90	26A	FAILURE RPT.NAME/ADD. CHANGE RMV
123	90	31	FAILING TO DIM LIGHTS IN M/V
167	90	32C	FAILING TO RETURN LEASED M/V
300	90	32F	OBTAINING MV FROM LESSOR BY FRAUD
124	90	34J	OPERATING AN UNINSURED M/V
902	90B	2	OPER./MAINTAIN UNNUMBERED M/B
903	90B	3	OP. M/B W/O CERT. NUMBER
904	90B	3	NO NO. CERTIFICATE FOR MOTORBOAT
905	90B	3	FAILING TO DISPLAY ID # ON M/B
907	90B	5G	PERMIT/OPER. M/B W/O LIFE PRES.
906	90B	8	SPEED WHILE OPER. A M/B
908	90B	8	OP. M/B NEGL. AS TO ENDANGER
909	90B	8	M/B RECKLESSLY TO ENDANGER
910	90B	8	OP. M/B UNDER INFLUENCE OF LIQ.
911	90B	8	OP. M/B UNDER INFLUENCE OF DRUG
912	90B	8 (C)	OP. M/B NO OBSERVER FOR SKIER
913	90B	8 (C)	OP. MOTORBOAT, NO LADDER FOR SKIER
914	90B	8 (E)	LEAVING SCENE AFT PROP DAM, M/B
915	90B	8 (E)	LEAVING SCENE AFT PERS INJ M/B
800	94C	27	POSS. INST. TO ADMIN. CONTR. SUBS.
801	94C	32	32(a) POSSESSION CLASS A W/INT TO DIS/MGF
806	94C	32	32(b) MFG/DISTRIB/DISPENS CLASS A
833	94C	32	32(c) MFG/DISTRIB/DISPENSE CLASS A SUBSEQUENT
802	94C	32A	32A(a) POSSESSION CLASS B W/INT TO DIS/MFG
807	94C	32A	32A(b) MFG/DISTRIBUTE/DISPENSE CLASS B
834	94C	32A	32A(c) MFG/DISTRIBUTE/DISPENSE CLASS B SUBSEQUENT
803	94C	32B	POSS. CLASS C SUB. W/INT. DIS/MFG
808	94C	32B	MFG/DISTRIB/DISPENS CLASS C SUB.
804	94C	32C	POSS. CL. D INT.TO DTRB/MFG/CULT
809	94C	32C	MFG/DISTRIB/CULT CLASS D SUB.
805	94C	32D	POSS. CLASS E SUB W/INT.TO DIST
810	94C	32D	MFG/DISTRIB/DISP CLASS E SUBSQ
811	94C	32E	TRAFFICKING IN MARIJUANA

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<u>Code</u>	<u>Chap.</u>	<u>Sect.</u>	
812	94C	32E	TRAFFICKING IN MARIJ., SUBSQ. OFF.
813	94C	32E	TRAFFICKING IN COCAINE
814	94C	32E	TRAFFICKING IN COCAINE SUBSQ.
815	94C	32E	TRAFFICKING IN HEROIN
816	94C	32E	TRAFFICKING IN HEROIN SUBSQ
S89	94C	32F	DIST DRUGS TO MINOR
817	94C	32G	CREATING/DIST. COUNTERFEIT SUBST.
S86	94C	32I	DRUG PARAPHERNALIA
S87	94C	32I	DRUG PARAPHERNALIA TO JUV
S90	94C	32J	CONTROLLED SUBSTANCE IN SCHOOL ZONE
S95	94c	32k	ABETTING MINOR TO SELL DRUG
818	94C	33	UTTERING A FALSE PRESCRIPTION
819	94C	33	UNLAWFULLY OBTAINING A CONT. SUBST.
820	94C	34	ILLEGAL POSS. OF A CLASS A SUBSTANCE
821	94C	34	ILLEGAL POSS OF CLASS A SUBSQ.
822	94C	34	ILLEGAL POSS. OF CLASS B SUBSTANCE
823	94C	34	ILLEGAL POSS. CLASS B SUBSQ.
824	94C	34	ILLEGAL POSS. OF CLASS C SUBSTANCE
825	94C	34	ILLEGAL POSS. CLASS C SUBSQ.
826	94C	34	ILLEGAL POSS. OF CLASS D SUBSTANCE
827	94C	34	ILLEGAL POSS. OF CLASS D, SUBSQ
828	94C	34	ILLEGAL POSS. OF CLASS E SUBSTANCE
829	94C	34	ILLEGAL POSS. OF CLASS E, SUBSQ
830	94C	35	KNOWINGLY BEING PRES HEROIN KEPT
831	94C	37	LARC OF CONTR SUB FROM AUTH
832	94C	40	CONSPIRACY VIOLATE NARCOTICS
S48	94C	47	FORFEITURE
1021	111	94C	TUBERCULOSIS COMMITMENT
1005	112	12S	ABORTIONS
1001	119	23	CARE & PROTECTION COMM. MOVING APPT. OF GUARDIAN
657	119	39	ABANDONMENT OF CHILD-CRIMINAL
1008	119	39E	CHINS
1016	119	51A	CARE AND PROTECTION
916	119	63	CONTRIBUTING TO DELINQ. OF CHILD
106	120	17	EXTENSION HEARING
1003	123	7,8	CIVIL COMMITMENT
1027	123	8B	AUTHORIZATION TO TREAT
1026	123	9a	COMMITMENT APPEAL
1004	123	9B	COMMITMENT REVIEW
1017	123	12E	WRIT OF APPREHENSION
176	123	15A	INIT COMPENT EVALUATION
178	123	15B	INPATIENT COMPT EVAL
1022	123	15E	COMMIT AFTER GUILTY FIND
177	123	16A	EVAL OF NGI OR NOT COMP. DEF
1023	123	16B	COMMIT OF CRIM DEFEND
1024	123	16C	RECOMMIT OF CRIM DEFEND
1025	123	18	COMMIT OF INMATE
1018	123	35	COMMITMENT OF ALCOHOLICS
1006	123A	5	S D P (SEXUAL DANGEROUS PERSON)
1007	123A	9	PETITIONS FOR RELEASE OR APPEAL FOR SDP
600	127	38B	PRISONER ASS/A&B ON CORR. OFF.
406	127	49	ESCAPE FROM WORK RELEASE
S28	127	83C	ESCAPE FROM PRISON
917	130	31	TAKING, ETC. LOBSTER POTS
918	130	37	TAKING LOB OR CRABS NO PERM
919	130	41	TAKING OR SELLING FEMALE LOBSTER
920	130	44	POSSESSION OR SALE OF SHORT LOBSTERS

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<u>Code</u>	<u>Chap.</u>	<u>Sect.</u>	
921	130	69	POSSESSION OF UNDERSIZED SHELLFISH
922	130	75	SHELLFISHING CONTAM AREA NO PERMIT
923	131	5	HUNTING, ETC. DURING CLOSED SEASON
924	131	11	HUNTING OR TRAPPING NO LICENSE
925	131	11	FISHING WITHOUT A LICENSE
926	131	36	FISHING HUNTING ON POSTED PROP
927	131	58	DISCHARGING WPN NR HGHWY DWELL
928	131	59	HUNTING ON COMM LAND NO PERMIT
929	131	65	HUNTING UNLAWFULLY BY M/V
930	131	66	POSS. LOADED SHELLS DURING CLOSED SEASON
931	131	68	HUNT UNLAW BY ARTIFIC. LIGHT
932	131	70	HUNT BY UNLAW MEANS OPEN SEAS
933	131	71	FAILING COMPLY COLOR REQ.
934	131	80A	HUNTING UNLAWFULLY BY LEHOLD TRAPS
935	131	82	ALLOWING DOG TO INTERFERE W/ DEER
936	138	16	ADULTERATION OF ALCOHOLIC BEVERAGE
667	138	34	DRINKING IN PUBLIC-ALONE MINOR ONLY-OK ADULT WITH OTHER
	CHRG		
937	138	34	SELL/DELIV. ALCOH. BEV. TO MINOR
938	138	34A	FALSIFYING AGE TO PURCHASE ALCOHOL
939	138	34A	MINOR PURCHASING ALCOHOL
940	138	34B	TRANSFER/ALTER/DEFACE LIQUOR ID
941	138	34B	MAKE/ETC. FLS. LIQUOR ID.
942	138	34B	USING LIQUOR ID CARD OF ANOTHER
943	138	34B	FUR. FALSE INFO. TO OBTN. LIQ. ID
944	138	34C	MINOR TRANSPORTING/CARRYING ALCOH.
668	138	34D	OPEN CONTAINER-ALONE MINOR ONLY-OK ADULT WITH OTHER
	CHARGES		
S91	138	S2	ILLEGAL ALCOHOL/LIQUOR KEEPING
301	140	12	DEFRAUDING AN INNKEEPER
302	140	12	DEFRAUDING A COMMON VICTUALLER
100	140	24	UNLICENSED KEEPERS;INJUNCTION
S68	140	122B	UNL. SALE OF AMMUNITION
S66	140	129	FICTITIOUS NAME ON F/A ID CARD
S67	140	131I	ALTER I.D. CARD
945	140	137	FAILING TO LICENSE A DOG
946	140	168	FAILING TO RESTRAIN A DOG
947	140	185A	RESELLING TICKETS W/O LICENSE
101	147	23	NECESSITY OF LICENSE;EXCEPTION
948	148	39	POSSESS/SELL/EXPLODE FIREWORKS
949	149	148	NON-PAYMENT OF WAGES
S16	151A	47	FAIL PAY CONTR DES ECT.
S19	159	103	INJURY TO TROLLEY CAR ETC.
S18	159	104	ASSAULT ON BUS DRIVER ETC.
303	159A	16	EVADING TAXI FARE
S47	164	126	UNLAW USE OF GAS
662	166	42a	TELECOMMUNICATION SERVICE;FRAUD;LESS THAN \$5000.
664	166	42a	TELECOMMUNICATION SERVICE;FRAUD;GREATER THAN \$5000.
663	166	42b	USE OF INSTRUMENT TO FRAUDULENTLY OBTAIN
	TELECOMMUNICATION		
950	186	14	LAND. ATT. POSS. W/OUT JUD. PROC.
951	186	14	LANDLORD INTERFERING W/QUIET ENJOY.
952	186	14	LANDLORD FAILING TO FURN. UTIL.
953	186	14	LANDL INTERF. W/ANOT. FURN. UTIL.
954	186	14	LANDL. TRANSF. UTIL.PAYMT. W/OUT CONS.
1015	201	5	GUARDIANSHIPS
1019	201	6A	COMMITMENT/GUARDIANSHIP OF MENTALLY RETARDED

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<u>Code</u>	<u>Chap.</u>	<u>Sect.</u>	
955	208	34C	VIOLATION OF RESTRAINING ORDER
1002	210	3	CHILD WELFARE AND ADOPTION
105	221	41	DISBARRED/UNAUTHORIZED ATTORNEY SOLICIT BUSINESS
S17	264	5	MISUSE OF FLAG
601	265	1	MURDER
603	265	13	MANSLAUGHTER
604	265	13A	ASSAULT
605	265	13A	ASSAULT AND BATTERY
606	265	13B	INDECENT A&B, CHILD UNDER 14
607	265	13B	INDECENT A&B CHILD UNDER 14 SUBSQ
608	265	13D	ASSAULT&BATTERY ON PUBLIC SERV.
609	265	13D	ASSAULT & BATTERY ON POLICE
S41	265	13F	INDEC A&B MENTALLY RETARDED PER
610	265	13H	INDECENT A&B ON PERSON 14 OR OVER
S42	265	13I	A & B ON EMT
652	265	13j	A&B SUBSTANTIAL INJURY TO CHILD
653	265	13j	A&B BODILY INJURY TO CHILD
611	265	14	ASSAULT W/INT TO MAIM WITH INJ.
612	265	14	MAYHEM
613	265	15	ASSAULT WITH INTENT TO MAIM
614	265	15	ASSAULT WITH INTENT TO MURDER
S08	265	15	ASSAULT WITH INTENT TO KILL
615	265	15A	A&B W/DANG. WPN., VICTIM 65+
616	265	15A	A&B DANG WPN VICTIM 65+ SUBSQ
617	265	15A	ASSAULT & BATTERY BY DANG. WEAPON
618	265	15B	ASSAULT W/DANG. WPN., VICTIM 65+
619	265	15B	ASSAULT DANG.WPN, VICTOM 65+ SUBS
620	265	15B	ASSAULT BY DANGEROUS WEAPON
S46	265	16	ATTEMPTED MURDER/NO ASSAULT
621	265	17	ARMED ROBBERY WHILE MASKED
622	265	17	ARMED ROBBERY
623	265	18	ARMED ASSAULT W/INT TO ROB MURDER
624	265	18	ARMED ASS. W/INT ROB/MUR 65+
625	265	18	ARMED ASS.INT.ROB/MUR 65+ SUBSQ
626	265	18A	ARMED ASSAULT IN A DWELLING
665	265	18b	USE OF FIREARM WHILE COMMITTING FLEONY
S43	265	18B	USE OF FIREARM COMM. FELONY
666	265	18c	HOME INVASION
627	265	19	ROBBERY, UNARMED
628	265	19	ROB UNARMED VICTIM 65+
629	265	19	ROB UNARMED VICT 65+ SUBSQ
630	265	20	UNARMED ASSAULT WITH INTENT TO ROB
S44	265	21	PERSON FEAR PURPOSE STEAL
651	265	21a	CARJACKING
631	265	22	AGGRAVATED RAPE
632	265	22	RAPE
634	265	22A	RAPE OF A CHILD, DEF. OVER 18, 2ND
635	265	22A	RAPE OF CHILD WITH FORCE
S01	265	23	STATUTORY RAPE
636	265	24	ASSAULT WITH INTENT TO RAPE
637	265	24	ASSAULT W/INTENT TO RAPE, SUBSQ.
638	265	24	ASSAULT W/INTENT TO RAPE A CHILD
639	265	24B	ASSLT.W/INT.RAPE CHILD,DEF.18+,2D
633	265	25	RAPE, SUBSEQUENT OFFENSE
S13	265	25	ATTEMPTING TO EXTORT BY THREAT
640	265	26	KIDNAPPING
641	265	26A	KIDNAPPING MINOR BY REL. & ENDANG.

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<u>Code</u>	<u>Chap.</u>	<u>Sect.</u>	
642	265	26A	KIDNAPPING OF MINOR BY RELATIVE
S45	265	28	POISONING
S09	265	29	ASSAULT WITH INTENT TO COMMIT FELONY
956	265	32	THROWING GLASS ONTO PUBLIC WAY
957	265	35	THROW./DROP OBJ. ON PUB. WAY
647	265	37	CIVIL RIGHTS VIOLATION, ATTEMPT
648	265	37	CIVIL RIGHTS VIOLATION, NO BODILY
649	265	37	CIVIL RIGHTS VIOLATION, BODILY INJ
650	265	37	INTIMIDATION/RACE,COLOR, ETC.
S93	265	43	STALKING IN V.O.P.O.
S92	265	43A	STALKING
S94	265	43D	HARASSMENT
500	266	1	BURNING A DWELLING HOUSE
501	266	2	BURNING A BUILDING
502	266	2	BURNING A PUBLIC BUILDING
503	266	2	BURNING THE CONTENTS OF A BUILDING
504	266	5	BURNING PERSONAL PROPERTY
S07	266	5A	ATTEMPT TO BURN BUILDING
S80	266	5A	ATTEMPTING ARSON
659	266	8	INJURY BY FIRE-NEGLIGENT USE
S71	266	10	BURNING INSURED PROPERTY
200	266	14	ARMED BURGLARY & ASSAULT ON OCC.
201	266	14	BURGLARY AND ASSAULT IN A DWELLING
202	266	15	UNARMED BURGLARY
203	266	16	DAMAGING A DEPOSITORY OF VALUABLES
204	266	16	ATT. TO DAMAGE DEPOS OF VALUABLES
205	266	16	BREAK & E NIGHT MV, BOAT, BUILD, INT. TO COMMIT A FEL.
206	266	16A	BREAK & E MV, BOAT, BUILD. NIGHT INT. TO COMMIT MISD.
207	266	16A	BREAK & E MV, BOAT, BUILD. DAY INT. TO COMMIT MISD.
208	266	17	ENT.W/O BRK. NIGHT,INT. FEL, IN FEAR
209	266	17	BREAK & E DAY INT FEL PERS IN FEAR
210	266	18	BREAK & E MV, BOAT, BUILD. DAY , INT. FELONY
211	266	18	ENT W/O BK.NIGHT DWEL. INT FEL
S81	266	19	B&E RAILROAD CAR
304	266	20	LARCENY IN BLDG SHIP VESSEL RR CAR
212	266	20A	BREAK & E TRUCK, INT. TO COMMIT A FELONY
213	266	20A	ENT.W/O BK, TRUCK,INT.TO COM.FELONY
305	266	20B	LARCENY IN A TRUCK
306	266	25	LARCENY FROM A PERSON
307	266	25	LARCENY FROM A PERSON OVER 65
308	266	25	LARCENY FROM A PERSON 65+, SUBSQ.
S70	266	27A	CONCEAL M/V DEFRAUD INS.
309	266	28	LARCENY OF M/V OR TRAILER
310	266	28	TAKING MV W/O AUTH STEALING PARTS
S03	266	28	RECEIVING STOLEN MOTOR VEH.
311	266	30	LARCENY OF PROPERTY \$250 OR LESS
312	266	30	LARCENY OF PROPERTY \$250 OR LESS UNDATED
313	266	30	LARCENY OF PROPERTY \$250 OR GREATER UNDATED
314	266	30	LARCENY OF PROPRTY \$250 OR MORE DATED
315	266	30	LARCENY OF A FIREARM
316	266	30A	SHOPLIFTING BY ASPORTATION
317	266	30A	SHOPLIFTING BY CONCEALING
318	266	30A	SHOPLIFTING BY PRICE TAG TAMPERING
319	266	30A	SHOPLIFTING, RECORDING FALSE VALUE
320	266	30A	SHOPLIFTING OF SHOPPING CART
321	266	30A	SHOPLIFTING BY CONTAINER TAMPERING
S72	266	34	LARCECNY FALSE PRETENCES > 250

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S73	266	34	LARCENY FALSE PRETENSES < 250
322	266	37	LARCENY BY CHECK, UNDATED
323	266	37	LARCENY BY CHECK, DATED
324	266	37B	LARCENY OF A CREDIT CARD
325	266	37B	RECEIVING STOLEN CREDIT CARD
326	266	37B	FALSE CREDIT CARD \$250 OR LESS
327	266	37C	GOODS WITH FALSE CREDIT CARD > \$250
328	266	49	POSSESSION OF M/V MASTER KEY
329	266	49	POSSESSION OF BURGLARIOUS TOOLS
330	266	60	RECEV. STOLEN PROP., \$100 OR LESS
331	266	60	RECEIVING STOLEN PROP., OVER \$100
332	266	63	UNAUTHORIZED USE OF A MOTOR BOAT
S82	266	67	FALSE ENTRY IN BOOK OF COR
S84	266	67B	FALSE CLAIM
179	266	87	LARCENY OF RENTED PROP
104	266	94	MALICIOUS DESTRUCTION;BOUNDARY,MONUMENTS
S83	266	97	DEFACING COUNTY BLDG
S78	266	98	INJURY TO SCHOOLHOUSE
660	266	100	WILLFUL DETENTION OF LIBRARY BOOKS
S04	266	102	THROWING EXPLOSIVE AT PROP.
958	266	102A	POSSESSION OF AN INFERNAL MACHINE
S79	266	102B	THROWING EXPLOSIVES
505	266	104	WILLFUL INJURY TO DWELLING OR BLDG
S69	266	111B	FRAUD INS. CLAIM-MV
102	266	112	ANIMAL, MAIM,KILL,POISON
333	266	113	TAKING OF CUT TIMBER
214	266	114	BREAKING GLASS IN A BUILDING
215	266	117	TRESPASS TO DAMAGE GRASS OR TREES
216	266	120	TRESPASS ON LAND, DWELLING, ETC
S75	266	121A	TRESPASSING W/MV
217	266	126a	GRAFFITI LAW
218	266	126b	TAGGING
506	266	127	WANTON DESTRUCTION OF PROPERTY OVER \$250
507	266	127	WANTON DEST. OF PROP., \$250 OR LESS
508	266	127	MAL. DESTR. OF PROP. OVER \$250
509	266	127	MAL. DEST. OF PROP., \$250 OR LESS
510	266	127A	VANDALISM OF CHURCH ETC., < \$5,000
511	266	127A	VANDALISM OF CHURCH ETC, > \$5,000
S74	266	129	INJURE PROPERTY AT MCI
168	266	139	ALTERING MOTOR VEHICLE ID NUMBERS
334	266	139	POSSESSING MV W/ALTERED NUMBERS
335	266	139	ATT. TO SELL MV W/ALTERED NUMBERS
336	266	139	SELLING MV W/ALTERED NUMBERS
661	266	143	UNATUHORIZED REPRODUCTION AND TRANSFER OF SOUND
RECORDINGS			
337	267	1	FORGERY, UNDATED
338	267	1	FORGERY, DATED
339	267	5	UTTERING A FORGED INSTR., UNDATED
340	267	5	UTTERING A FORGED INSTR. DATED
341	267	10	UTTERING COUNTERFEIT BILL, UNDATED
342	267	10	UTTERING COUNTERFEIT BILLS, DATED
343	267	12	POSSESSION OF COUNTERFEIT BILLS
959	268	1	PERJURY
960	268	13B	INTIMIDATION OF A WITNESS
103	268	13C	DISRUPTION OF COURT PROCEEDING
S33	268	15	ATTEMPT RESCUE OF PRISONER
961	268	16	PRISONER ESCAPING FROM CUSTODY

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<u>Code</u>	<u>Chap.</u>	<u>Sect.</u>	
S36	268	17	ATTEMPTING TO RESCUE A PRISONER
S30	268	28	ATT DELIV C/S TO INMATE
S31	268	32	PULL FALSE ALARM ETC.
S32	268	32A	INTERFERE WITH FIRE FIGHTING OPER
015	268	32b	RESISTING ARREST
656	268	32b	RESISTING ARREST
S35	268	33	IMPERSONATING POLICE OFFICE
S02	268	34	DISGUISE TO OBSTRUCT JUSTICE
S34	268	39	FALSE STATEMENT TO POLICE MV THEFT
S15	268A	2	CORRUPT GIFTS TO OFFICIAL ETC
963	269	10	CARRYING DANG. WEAPON, SUBSQ. OFF.
702	269	10(A)	CARRYING FIREARM W/O LIC.
703	269	10(AD)	CARR. FIREARM W/O LIC., SUBSQ.
962	269	10(B)	CARRYING A DANGEROUS WEAPON
704	269	10(C)	POSS.SHOTGUN, BARREL < THAN 18"
705	269	10(C)	POSS SHOTGUN BAR.UND.18" SUBSQ.
706	269	10(C)	POSSESSION OF A MACHINE GUN
707	269	10(C)	POSS. OF MACHINE GUN, SUBSQ. OFF.
700	269	10(H)	POSS. FIREARM W/O FIREARM ID.
701	269	10(H)	POSS.FIREARM W/O ID CARD, SUBSQ.
709	269	10C	USE OF MACE OR TEAR GAS IN CRIME
658	269	10h	POSSESSING AMMUNITION
708	269	12E	DISCHRG FIREARM W/IN 500' OF BLDG.
964	269	13	CAUSING A FALSE FIRE ALARM
S65	269	13A	FALSE REPORT TO P.O.
965	269	14	COMMUNICATING FALSE BOMB REPORT
966	269	14A	MAKING OBSCENE TELEPHONE CALLS
967	269	14A	MAKING ANNOYING TELEPHONE CALLS
968	270	16	LITTERING
S20	270	18	INHAL TOXIC SUBSTANCE, ETC.
S14	271	2	GAMING
S37	271	5	GAMING--KEEPING COMMON GAMING HOUSE
S39	271	7	SETTING UP AND PROM. LOTTERY
S38	271	17	UNLAW REG BETS
S40	271	18	POSS LOTTERY OPERATION
S63	272	4	ENTICING TO UNLAWFUL SEX INTERCOURSE
S56	272	4A	INDUCING MINOR PROSTITUTION
S57	272	5	SEX W/FEEBLE MIND
S55	272	6	PLACE FOR PROSITUTION
S05	272	7	EARNINGS OF PROSTITUTION
S51	272	8	SOLICITING FOR PROSTITUTE
S54	272	12	PROCURING
S62	272	14	ADULTERY
973	272	16	OPEN AND GROSS LEWDNESS
974	272	16	LEWD AND LASCIVIOUS COHABITATION
S06	272	17	INCEST
S58	272	18	FORNICATION
S50	272	24	HOUSE OF ILL FAME
S11	272	28	DISSEMINATION OF HARMFUL MATTER TO A MINOR
S12	272	29A	POSING CHILD NUDE
038	272	29C	POSSESS CHILD PORNOGRAPHY FIRST OFFENSE
039	272	29C	POSSESS CHILD PORNOGRAPHY SECOND OFFENSE
S10	272	34	UNNATURAL ACT SODOMY
S88	272	34	SODOMY
644	272	35	UNNATURAL ACTS
645	272	35A	UNNATURAL ACT WITH CHILD UNDER SIXTEEN
646	272	35A	UNNAT. ACT W/CHILD UNDER 16, 2ND

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<u>Code</u>	<u>Chap.</u>	<u>Sect.</u>	
S53	272	40	DIST SCHOOL ASSEMBLY
401	272	53	DISORDERLY PERSON
402	272	53	DISTURBING THE PEACE
975	272	53	INDECENT EXPOSURE
976	272	53	LEWD & LASCIVIOUS
977	272	53A	PROSTITUTION
978	272	53A	PROSTITUTION, PAYMENT FOR SEX
S85	272	68	LOITERING
S59	272	73	WILLFUL INJURY GRAVESTONE
S61	272	75	REMOVE FLAG FROM GRAVE
S52	272	77	CRUELTY TO ANIMAL
010	273	1	NONSUPPORT OF SPOUSE
013	273	1	NONSUPPORT OF SPOUSE, MINOR CHILD
014	273	12	ADJUDICATION OF PATERNITY
S24	273	13	NONSUPPORT WIFE/CHILD CRIM CONTEMPT
011	273	15	NONSUPPORT OF ILLEGITIMATE MINOR CHILD
602	274	2	MURDER
971	274	2	ACCESSORY BEFORE FACT
972	274	4	ACCESSORY AFTER THE FACT
969	274	6	ATTEMPTING TO COMMIT CRIME
643	275	2	THREATENING TO COMMIT A CRIME
991	276	20	INTERSTATE RENDITION
S23	276	20A	FUGITIVE FROM JUSTICE
899	276	58	BAIL ONLY
900	276	58	BAIL PETITION/APPEAL
898	276	58A	DANGEROUSNESS HEARING
897	276	82	WITHDRAWAL OF BAIL REVIEW PETITION
979	276	82	BAIL OR RECOGNIZANCE VIOLATION
S25	276	82A	FAILURE TO APPEAR
S21	279	5	COMMON LAW CRIMES
670	279	7	NONPAYMENT OF FINES-SENTENCED TO JAIL
1013	992	1	FOSTER CARE REVIEW
1012	993	1	HOUSING CONTEMPT
1011	994	1	CRIM CONTEMPT PROB CT
1010	995	1	SPRING/SAIKEWICZ
1009	996	1	ROGERS
1029	996	1	GERIATRIC ROGERS
990	999	999	PROBATION SURRENDER
1014	9999	99	ELDERLY ABUSE
125	A3	1	ONE WAY STREET VIOLATION
126	A3	1	OP. WRONG WAY AT ROTARY
127	A4	1	MARKED LANES VIOLATION
128	A4	2	FAILURE TO KEEP RIGHT
129	A4	7	FOLLOWING TOO CLOSELY
130	A4	9	FL. CARE IN STRT-STOP-TURN
131	A4	10	RED LIGHT VIOLATION
132	A4	11	STOP SIGN VIOLATION
133	A4	11A	YIELD SIGN VIOLATION
134	A4	19	CHANNELIZING ISL. VIOL.
135	A4	20	DISOBEYING TRAFFIC SIG.
136	A4	23	U-TURN VIOLATION
400	CL	1	AFFRAY
970	CL	2	CONSPIRACY
777	N/A	N/A	NO CASE DUTY DAY
888	N/A	N/A	DUTY ATTORNEY (SURRENDER AND CONTEMPT HEARINGS)
889	N/A	N/A	REPRESENTING WITNESS
995	N/A	N/A	UNKNOWN CHARGE

Offense codes sorted by Chapter and Section

<u>Code</u>	<u>Chap.</u>	<u>Sect.</u>	
997	N/A	N/A	PROBATION VIOLATION OR SURRENDER
M01	N/A	N/A	MENTOR CRIMINAL CASES
MCA	N/A	N/A	MENTOR CRIMINAL APPEAL
MFA	N/A	N/A	MENTOR FLAP APPEAL
MFL	N/A	N/A	MENTOR FLAP CASES
MH1	N/A	N/A	MENTOR MENTAL HEALTH
MOF	N/A	N/A	MONITORING FLAP ATTY
MSF	N/A	N/A	MENTOR SUPERVISION LAP

Offense codes sorted by Chapter and Section
Code Chap. Sect.

IX. COURT CODES

Alphabetical listing of Massachusetts courts

Court #	Name of court
999	ADVICE CASES ONLY SUPERIOR COURT
495	AMESBURY DISTRICT COURT
393	APPEALS COURT
492	ATTLEBORO DISTRICT COURT
521	AYER DISTRICT COURT
484	BARNSTABLE DISTRICT COURT
028	BARNSTABLE JUVENILE COURT
057	BARNSTABLE PROBATE COURT
469	BARNSTABLE SUPERIOR COURT
019	Berkshire JUVENILE COURT
027	BERKSHIRE JUVENILE COURT
058	BERKSHIRE PROBATE COURT
470	BERKSHIRE SUPERIOR COURT
905	BOSTON (USDC) DISTRICT COURT
564	BOSTON JUVENILE COURT
559	BOSTON MUNICIPAL DISTRICT COURT
534	BRIGHTON DISTRICT COURT
565	BRISTOL JUVENILE COURT
059	BRISTOL PROBATE COURT
471	BRISTOL SUPERIOR COURT
530	BROCKTON DISTRICT COURT
200	BROCKTON JUVENILE COURT
529	BROOKLINE DISTRICT COURT
519	CAMBRIDGE DISTRICT COURT
487	CENTRAL BERKSHIRE DISTRICT COURT
535	CHARLESTOWN DISTRICT COURT
536	CHELSEA DISTRICT COURT
505	CHICOPEE DISTRICT COURT
548	CLINTON DISTRICT COURT
523	CONCORD DISTRICT COURT
525	DEDHAM DISTRICT COURT
537	DORCHESTER DISTRICT COURT
014	DORCHESTER JUVENILE COURT
549	DUDLEY DISTRICT COURT
060	DUKES PROBATE COURT
472	DUKES SUPERIOR COURT
538	EAST BOSTON DISTRICT COURT
552	EAST BROOKFIELD DISTRICT COURT
493	EDGARTOWN DISTRICT COURT
031	EDGARTOWN JUVENILE COURT
061	ESSEX PROBATE COURT
473	ESSEX SUPERIOR COURT
490	FALL RIVER DISTRICT COURT
100	FALMOUTH DISTRICT COURT
029	FALMOUTH JUVENILE COURT
543	FITCHBURG DISTRICT COURT
522	FRAMINGHAM DISTRICT COURT
062	FRANKLIN PROBATE COURT
474	FRANKLIN SUPERIOR COURT
045	FRANKLIN/HAMPSHIRE JUVENILE COURT
546	GARDNER DISTRICT COURT

Alphabetical listing of Massachusetts courts

Court #	Name of court
498	GLOUCESTER DISTRICT COURT
503	GREENFIELD DISTRICT COURT
562	HAMPDEN HOUSING COURT
063	HAMPDEN PROBATE COURT
475	HAMPDEN SUPERIOR COURT
064	HAMPSHIRE PROBATE COURT
476	HAMPSHIRE SUPERIOR COURT
497	HAVERHILL DISTRICT COURT
531	HINGHAM DISTRICT COURT
201	HINGHAM JUVENILE COURT
506	HOLYOKE DISTRICT COURT
496	IPSWICH DISTRICT COURT
071	LAND COURT LAND COURT
499	LAWRENCE DISTRICT COURT
018	LAWRENCE JUVENILE COURT
544	LEOMINSTER DISTRICT COURT
512	LOWELL DISTRICT COURT
500	LYNN DISTRICT COURT
013	LYNN JUVENILE COURT
517	MALDEN DISTRICT COURT
515	MARLBOROUGH DISTRICT COURT
906	MENTOR APPOINTMENT COURT
065	MIDDLESEX PROBATE COURT
477	MIDDLESEX SUPERIOR COURT
551	MILFORD DISTRICT COURT
524	NANTUCKET DISTRICT COURT
030	NANTUCKET JUVENILE COURT
066	NANTUCKET PROBATE COURT
478	NANTUCKET SUPERIOR COURT
516	NATICK DISTRICT COURT
491	NEW BEDFORD DISTRICT COURT
501	NEWBURYPORT DISTRICT COURT
022	NEWBURYPORT JUVENILE COURT
514	NEWTON DISTRICT COURT
067	NORFOLK PROBATE COURT
479	NORFOLK SUPERIOR COURT
510	NORTHAMPTON DISTRICT COURT
486	NORTHERN BERKSHIRE DISTRICT COURT
504	ORANGE DISTRICT COURT
485	ORLEANS DISTRICT COURT
032	ORLEANS JUVENILE COURT
507	PALMER DISTRICT COURT
502	PEABODY DISTRICT COURT
532	PLYMOUTH DISTRICT COURT
033	PLYMOUTH JUVENILE COURT
068	PLYMOUTH PROBATE COURT
480	PLYMOUTH SUPERIOR COURT
526	QUINCY DISTRICT COURT
539	ROXBURY DISTRICT COURT
494	SALEM DISTRICT COURT
036	SALEM JUVENILE COURT

Alphabetical listing of Massachusetts courts

Court #	Name of court
513	SOMERVILLE DISTRICT COURT
540	SOUTH BOSTON DISTRICT COURT
488	SOUTHERN BERKSHIRE DISTRICT COURT
508	SPRINGFIELD DISTRICT COURT
566	SPRINGFIELD JUVENILE COURT
528	STOUGHTON DISTRICT COURT
482	SUFFOLK CIVIL SUPERIOR COURT
481	SUFFOLK CRIMINAL SUPERIOR COURT
561	SUFFOLK HOUSING COURT
015	SUFFOLK JUVENILE COURT
069	SUFFOLK PROBATE COURT
048	SUPREME JUDICIAL COURT
489	TAUNTON DISTRICT COURT
998	U.S. DISTRICT COURT MASS SUPERIOR COURT
550	UXBRIDGE DISTRICT COURT
541	W ROXBURY DISTRICT COURT
518	WALTHAM DISTRICT COURT
511	WARE DISTRICT COURT
533	WAREHAM DISTRICT COURT
202	WAREHAM JUVENILE COURT
547	WESTBOROUGH DISTRICT COURT
509	WESTFIELD DISTRICT COURT
545	WINCHENDON DISTRICT COURT
520	WOBURN DISTRICT COURT
542	WORCESTER DISTRICT COURT
644	WORCESTER HOUSING COURT
567	WORCESTER JUVENILE COURT
070	WORCESTER PROBATE COURT
483	WORCESTER SUPERIOR COURT
527	WRENTHAM DISTRICT COURT

X. APPLICABLE STATUTE AND COURT RULES

MASSACHUSETTS GENERAL LAWS CHAPTER 211D COMMITTEE FOR PUBLIC COUNSEL SERVICES

211D:1. Committee Membership; Terms; Filling Vacancies; Reimbursement; Conflicts of Interest.

Section 1. There shall be a committee for public counsel services, hereinafter referred to as the committee, to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services by all salaried public counsel, bar advocate and other assigned counsel programs, and private attorneys serving on a per case basis. The committee shall consist of fifteen persons to be appointed for a term of three years by the justices of the supreme judicial court. Said court shall request and give appropriate consideration to nominees for the fifteen positions from the Massachusetts Bar Association, county bar associations, the Boston Bar Association, and other appropriate bar groups including, but not limited to, the Massachusetts Black Lawyers' Association, Women's Bar Association, and the Massachusetts Association of Women Lawyers. Each member of the committee shall serve until his successor in office has been appointed and qualified. Vacancies shall be filled by the justices of the supreme judicial court by appointment to an unexpired term. Members of the committee may be removed by the justices of the supreme judicial court. No member of the committee shall receive any compensation for his services, but each member shall be reimbursed for actual expenses incurred in attending the committee meetings.

The provisions of chapter two hundred and sixty-eight A shall apply to all members, officers and employees of the committee, except that the committee may provide representation or enter into a contract pursuant to the provisions of sections three or six although a member of the committee may have an interest or involvement in any such matter; provided, however, that such interest and involvement is disclosed in advance to the other members of the committee and recorded in the minutes of the committee; and provided, further, that no member having an interest or involvement in any contract under section three may participate in any particular matter, as defined in section one of chapter two hundred and sixty-eight A, relating to such contract.

211D:2. Establishment of Standards and Definition of "Indigency."

Section 2. The committee for public counsel shall establish a definition of "indigency" for the purposes of this chapter and uniform standards and procedures for the determination by the courts of the commonwealth that (1) a person is indigent and is unable to obtain counsel or (2) said indigent person has the ability to pay a reduced fee for the appointment of counsel. Said definition and standards, and any amendments thereto, shall be subject to the approval of the supreme judicial court and shall be used by the courts of the commonwealth in determining assignment of cases to the committee pursuant to section five. In the formulation of said definition, standards, and procedures, the committee shall consider the reporting system operated

by the commissioner of revenue for the purpose of verifying financial eligibility of participants in state or federally funded programs, and its potential applicability to the provision of legal services for indigent defendants. Payment of any reduced fee by an indigent person for the appointment of counsel shall be made to the probation department of the appointing court, and shall be forwarded to the state treasurer who shall deposit such in the general fund.

211D: 2A. Appointed Counsel Unnecessary if Incarceration not Part of Sentence; Assessment of Legal Counsel Fee.

Section 2A. Notwithstanding any other provision of law, a criminal defendant charged with a misdemeanor or a violation of municipal ordinance or bylaw need not be appointed counsel if the judge, at arraignment, informs such defendant on the record that, if the defendant is convicted of such offense, his sentence will not include any period of incarceration. For good cause, that judge or another judge of the same court may later revoke such determination on the record and appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial. Any such determination or revocation by a judge shall be endorsed upon the docket of the case.

Any person provided counsel under the provisions of this chapter shall be assessed a legal counsel fee of one hundred dollars which may be waived at the discretion of the court. Said fee shall be in addition to any reduced fee required pursuant to section two and shall be collected in accordance with said section.

The department of revenue shall be authorized to intercept said fee from tax refunds due to persons who have not paid said fee.

The department of public welfare shall be authorized to deduct said fee in weekly or monthly increments from persons who have not paid said fee.

211D:3. Gifts and Grants or Contributions to Committee.

Section 3. Said committee may accept gifts, grants or contributions from any source, whether public or private, and may enter into contracts to provide or receive services with any federal, state, county or municipal entity, with any group or individual, whether profit or nonprofit, or with any nonprofit or voluntary charitable group, corporation, association or organization, including any bar association or bar advocate group.

211D:4. Rules and Regulations; Annual Report; Training of Counsel; Rotating Appointments.

Section 4. Said committee shall adopt such rules and regulations as may be necessary for the conduct of its affairs and may from time to time amend or revise the same. The committee shall prepare an annual report which shall be a public document. The committee shall establish standards and guidelines for the training, qualification and removal of counsel in the public and private counsel divisions who accept its appointments, and shall provide pre-service and in-service training for both private counsel who accept assignments and salaried public counsel.

The committee may establish a rotating appointment mechanism that will encourage open access among attorneys participating within the private counsel division.

211D:5. Appointment or Assignment of Counsel.

Section 5. Said committee shall establish, supervise and maintain a system for the appointment or assignment of counsel at any stage of a proceeding, either criminal or noncriminal in nature, provided, however, that the laws of the commonwealth or the rules of the supreme judicial court require that a person in such proceeding be represented by counsel; and, provided further, that such person is unable to obtain counsel by reason of his indigency. The committee may also establish a system for the provision of counsel in any pre-arraignment procedure. A justice or associate justice shall assign a case to the committee, as hereinafter provided, after receiving from the probation officer a written report containing the probation officer's opinion as to the defendant's ability to pay for counsel, based on the standards and procedures provided for in section two.

211D:6. Use of Public Defender Division; Private Counsel Division.

Section 6. In carrying out its duties as prescribed in section five, the committee shall:

- (a) Utilize its staff of attorneys, which shall be known hereafter as the "public defender division". Said division shall include a unit to be known as the Roxbury defenders unit, which shall represent clients as assigned pursuant to this chapter in the Roxbury division of the district court department. Said division shall also include a unit to be known as the youth advocacy project. Said division shall be assigned to represent indigent defendants in all criminal cases, except that:
 - (i) said division shall not be assigned to represent more than one defendant in any matter before any court on the same case or arising out of the same incident;
 - (ii) said division shall not be assigned to represent a defendant in any case in which there is a conflict of interest with any of its clients;
 - (iii) said division shall not be assigned to a case where a person is before the probate and family court department or the housing court department for criminal contempt or in such other proceeding in said departments in which such person is entitled to be represented by counsel;
 - (iv) said division shall not be assigned to represent any child alleged to be delinquent, except in such cases which may result in exposure to adult incarceration or commitment to the department of youth services until the age of twenty-one, and except in cases charging delinquency by conduct which would be punishable by imprisonment in the state prison if committed by an adult and except in the Boston and Bristol county divisions of the juvenile court department or in the Roxbury division of the district court department. Private counsel who have been certified to accept assignments in such cases shall also be eligible to provide representation to persons thus charged;
 - (v) said division shall not be assigned to represent any person charged with a misdemeanor unless said misdemeanor is in conjunction with a felony charge for which said division has been assigned.

- (b) Establish, supervise, and maintain a system for the appointment of private counsel, hereafter called the "private counsel division", which shall include a children and family law program and a mental health unit. The committee shall enter into contractual agreements with any state, county or local bar association or voluntary charitable group, corporation or association, including bar advocate groups, for the purpose of providing such counsel. Said committee may also contract with such other organized groups of attorneys as may be formed to afford representation to indigent defendants and may appoint and compensate private attorneys, on a case-by-case basis, as counsel for indigents entitled to representation. Neither individuals nor members nor participants in any group, corporation or association with whom the committee may contract under this paragraph shall be considered to be or have any rights as state employees.
- (i) Said division shall be assigned for all persons accused of crimes entitled to counsel who, through their inability to pay for counsel, must have counsel appointed to them, but who, pursuant to the provisions of subparagraph (a) of this section are not to be represented by the public counsel division.
 - (ii) Said division shall be assigned to represent a person who is before the probate and family court department or the housing court department in a criminal contempt proceeding or in such other proceeding in said departments in which a person is entitled to be represented by counsel.
 - (iii) Said division shall also be assigned to represent persons in such other proceedings as the chief counsel shall determine to be necessary.

211D:6A.

Section 6A. In carrying out its duties as prescribed in sections 5 and 6, the committee shall, subject to appropriation, utilize its attorney staff within the private counsel division. The committee shall establish a children and family law program in the counties of Essex and Hampden which shall, upon the court's appointment, provide representation to indigent persons in children and family law cases. Nothing herein shall be construed to limit the system as established in sections 5 and 6 of this chapter, whereby the court appoints certified private counsel to represent children and parents in the majority of children and family law cases.

211D:7. Representation of Persons Charged with Concurrent Felonies Under ALM GL c 218 ' 26.

Section 7. Said division shall be assigned to represent persons charged in the district court department with concurrent felonies under section twenty-six of chapter two hundred and eighteen as further defined by the committee.

211D:8. Representation of Persons Accused of Murder.

Section 8. Upon a determination by a court that a person accused of murder in the first or second degree is indigent, the chief counsel or his designee may assign the case to either the public defender division or the private counsel division, subject to the approval of the justice making the determination of indigency.

211D:9. Development of Standards.

Section 9. The committee shall establish standards for the public defender division and the private counsel division which shall include but not be limited to:

- (a) vertical or continuous representation at the pre-trial and trial stages by the attorney either assigned or appointed, whenever possible;
- (b) required participation by each attorney in an approved course of training in the fundamentals of criminal trial practice, unless the attorney has a level of ability which makes such participation unnecessary;
- (c) specified caseload limitation levels;
- (d) investigative services;
- (e) a method for the provision of social services or social service referrals;
- (i) availability of expert witnesses to participating counsel;
- (ii) clerical assistance, interview facilities, and the availability of a law library and model forms to participating counsel; and
- (iii) adequate supervision provided by experienced attorneys who shall be available to less experienced attorneys.
- (iv) qualifications for vendors for the services provided in clauses (d), (e), and (f) and a range of rates payable for said services, taking into consideration the rates, qualifications and history of performance; provided, however, that such ranges may be exceeded with approval of the court. Payment of such costs and fees shall be in accordance with the provisions of section twenty-seven A to G, inclusive, of chapter two hundred and sixty-one.

211D:10. Monitoring and Evaluating Counsel; Client Complaint Resolution; Comments by Justice on Counsel's Performance.

Section 10. The committee shall monitor and evaluate compliance with the standards and the performance of counsel in its divisions in order to insure competent representation of defendants in all courts of the commonwealth and shall establish a procedure for the review and disposition of client complaints. The committee shall also establish procedures whereby comments on the standard of performance of counsel in its divisions may be submitted by the justice hearing a particular matter.

211D:11. Establishment and Review of Compensation Rates.

Section 11. The committee shall establish rates of compensation payable, subject to appropriation, to all counsel who are appointed or assigned to represent indigents within the private counsel division in accordance with the provisions of paragraph (b) of section six. Such rates of compensation shall be reviewed periodically at public hearings held by the committee at appropriate locations throughout the state, and notice shall be given to all state, county and local bar associations and other interested groups, of such hearings by letter and publication in advance of such hearings. Such periodic review shall take place not less than once every two years.

211D:12. Compensation of Private Counsel; Remedy for Counsel Aggrieved by Amount of Compensation; Audit and Oversight Department; Delayed Submission of Counsel Bills.

Section 12. The committee shall establish policies and procedures to provide fair compensation to private counsel, which shall include a remedy for any attorney aggrieved by the amount of payment. The committee shall also establish an audit and oversight department to monitor billing and private attorney compensation. All invoices shall be processed for payment within thirty days of receipt by the chief counsel. Bills shall be submitted to the committee within thirty days of the conclusion of a case; or, if the case is pending at the end of the fiscal year, within thirty days after the end of such fiscal year. The amount of payment for invoices received by the chief counsel more than thirty days after the final disposition of the case or more than thirty days after the end of the fiscal year shall be reduced by five percent. Bills submitted after such date need not be processed for payment within thirty days. The committee may further prescribe such policies and procedures for payment as it deems appropriate; provided, however, that the committee may impose interest and penalties, where appropriate, upon overpayment of the private attorney bills recovered from private attorneys.

211D:13. Chief and Deputy Chief Counsel; Legal and Nonlegal Staff of Public Counsel Division.

Section 13. The committee shall appoint a chief counsel, whose responsibilities and duties shall be defined by the committee and shall include, but not be limited to, the overall supervision of the workings of the various divisions of the committee. The committee shall further appoint two deputy chief counsel, with duties defined by the committee, one of whom shall supervise the public defender division, and the other shall supervise the private counsel division. The committee shall also prescribe the procedures for the appointment of all legal and nonlegal staff of the public defender division and for the procurement of office space as may be required. The chief counsel shall authorize the certification of all payments under section twenty-seven G of chapter two hundred and sixty-one and section twenty of chapter twenty-nine. All legal and nonlegal staff of the public counsel division shall be full time and shall devote their entire time during ordinary business hours to their duties and shall neither directly or indirectly engage in the private practice of law. The chief counsel and deputy chief counsels shall likewise devote full time to their duties. The chief counsel, deputy chief counsels and all legal and non-legal staff of the committee, including staff attorneys hired under subparagraphs (a) and (b) of section 6 but not including persons described in the fourth sentence of said subparagraph (b) of said section 6, shall be considered public employees for purposes of chapter 258. The chief counsel shall be paid a salary comparable to the salary paid to a district attorney. The salaries of the deputy chief counsels shall be established by the committee. All other legal staff of the public defender division shall be paid at salaries comparable to the salary paid to an attorney employed in a district attorney's office.

The counsel and other employees appointed by the committee shall not be subject to the provisions of chapter thirty-one.

211D:14. Public Counsel Division to Represent Indigents in Appeals and Related Post-Conviction Proceedings; Conflicts of Interest.

Section 14. The public counsel division, except in cases of conflict of interest, shall represent indigent defendants in all appeals and related post-conviction remedies. In the case of a conflict of interest, the assignment shall be to the private counsel division.

211D:15. Consultation with Greater Roxbury Community Advisory Board.

Section 15. The committee shall consult regularly with a community advisory board appointed by the committee to represent the greater Roxbury community. Members of the community advisory board shall not receive compensation or reimbursement for expenses.

EXCERPTS FROM
SUPREME JUDICIAL COURT RULE 3:10

(Amended July 1, 1986)

(PROPOSED REVISIONS CURRENTLY UNDER CONSIDERATION BY THE SJC)

3:10 ASSIGNMENT OF COUNSEL
(Applicable to all courts)

Section 1. Advice as to Right to Counsel.

If any party to a proceeding in which the law of the Commonwealth or the rules of this court establish a right to be represented by counsel initially appears in any court without counsel, the judge shall advise the party, or if the party is a juvenile, the juvenile and a parent or legal guardian, where appropriate, that: (a) in this case the law requires that counsel be available, at public expense if necessary and (b) if the court finds that the party wants counsel and cannot afford his own counsel, then the Committee for Public Counsel Services will provide counsel at no cost or at a reduced cost. Thereafter, the judge shall make findings as provided in the following sections of this rule.

Section 2. Waiver of Counsel.

If the party knowingly elects to proceed without counsel, a written waiver by the party and a certificate of the judge on the form established in Section 9 of this rule shall be signed, respectively, by the party and the judge and filed with the papers in the case. If the party knowingly elects to proceed without counsel but refuses to sign the form established in Section 9 of this rule, the judge shall so certify on that form, which shall be filed with the papers in the case.

Section 3. Findings as to Right to Counsel.

If the judge finds that the party has not knowingly elected to proceed without counsel and the party does not arrange to obtain his own counsel, the judge shall receive a written report and opinion as to indigency from a probation officer or other appropriate court employee as provided in Section 6 of this rule. After reviewing the report and opinion and interrogating the party, as appropriate, the judge shall make one of the following three determinations:

- (a) the party is indigent, or
- (b) the party is indigent but able to contribute, or
- (c) the party is able to procure counsel.

In making such findings, the judge shall be guided by the definitions in Section 6 of this rule. The judge shall record his findings on the form provided in Section 6(c) which shall be filed with the papers in the case.

Section 4. Assignment of Counsel/Notice of Assignment.

If under Section 3 of this rule the judge finds that the party is in category (a) or (b), the judge shall assign the Committee for Public Counsel Services to provide representation for the party, unless exceptional circumstances, supported by written findings, necessitate another procedure, provided that such procedure is consistent with Chapter 211D of the General Laws and the rules of this court. The court clerk or register shall promptly complete and transmit a Notice of Assignment of Counsel Form, as provided by the Committee for Public Counsel Services with the approval of this court, to the party and file a copy with the papers in the case.

If under Section 3 of this rule the judge finds that the party is in category (c) but has not after a reasonable time either waived counsel or procured counsel, then the case may be ordered to proceed.

Section 5. Standby Counsel.

Notwithstanding a party's waiver of counsel, the judge may assign counsel in accordance with this rule to be available to assist the party in the course of the proceedings.

Section 6. Establishing Indigency.

(a) Definitions -

The following definitions shall be applied in connection with this rule:

- (i) Indigent - A person who, at any stage of a court proceeding, is:
 - (A) receiving one of the following types of public assistance: AFDC, GR, poverty related veterans' benefits, food stamps, refugee resettlement benefits, Medicaid, or SSI; or
 - (B) committed to a public mental health facility; or
 - (C) serving a sentence and in custody in a jail or correctional institution; or
 - (D) receiving an annual income, after taxes, one hundred twenty-five per cent or less of the current poverty threshold referred to in Section 27A(b) of Chapter 261 of the General Laws; or

- (E) unable to pay the anticipated cost of counsel for the matter(s) before the court because his available funds are insufficient to pay any amount for the retention of counsel
- (ii) Indigent But Able to Contribute - A person who, at any stage of a court proceeding, is unable to pay the anticipated cost of counsel for the matter(s) before the court because his available funds are less than the anticipated cost of counsel but sufficient for the person to pay a portion of that cost.
 - (iii) Anticipated Cost of Counsel - The cost of retaining private counsel for representation on the matter(s) before the court, as periodically estimated and published by the Committee for Public Counsel Services.
 - (iv) Available Funds - Liquid assets and disposable net monthly income calculated after provision is made for bail obligations. For the purpose of determining available funds, the following definitions shall apply:
 - (A) Liquid assets - cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real estate, and equity in motor vehicles. One motor vehicle necessary to maintain employment shall not be considered a liquid asset.
 - (B) Income - salary, wages, interest, dividends, and other earnings which are reportable for federal income tax purposes, and cash payments such as reimbursements received from pensions, annuities, social security and public assistance programs. It includes any contribution received from any family member and other person who is domiciled in the same residence as the defendant and who is helping to defray the family's basic living costs.
 - (C) Disposable net monthly income - the income remaining each month after deducting federal, state and local income taxes, social security taxes, contributory retirement, union dues, and basic living costs.
 - (D) Basic living costs - the average monthly amount spent by the party for reasonable payments towards living costs, such as shelter, food, utilities, health care, transportation, clothing, loan payments, support payments, and court-imposed obligations.
- (b) Report by Probation Officer or Other Appropriate Court Employee - The probation officer or other appropriate court employee shall provide to a judge a written report and opinion as to indigency on a form prescribed by this court* based on information obtained from the party and subject to a verification system established by the Chief Administrative Justice of the Trial Court. The form shall include information necessary to provide a basis for making a determination with respect to indigency as provided in this rule.

*The form prescribed by the Supreme Judicial Court is as follows.

- (c) Findings and Conclusions of Indigency Form - The following form shall be employed by the judge in making findings and conclusions as to entitlement to assigned counsel as required by Section 3 of this rule.

Section 7. Inadmissibility of Information Obtained From a Party in Connection with This Rule.

No information provided by a party pursuant to this rule may be used in any criminal or civil proceeding against him except in a prosecution for perjury or contempt committed while providing such information.

Section 8. Counsel for Parties Indigent and Indigent but Able to Contribute.

- (a) Appearance of Counsel. Counsel assigned by the Committee for Public Counsel Services to represent a party pursuant to this rule shall file an appearance in the case within forty-eight hours after notification of the assignment.
- (b) Withdrawal of Appearance. If counsel assigned by the Committee for Public Counsel Services, who has filed an appearance, is unable or unwilling to represent a party, he shall move to withdraw his appearance. If the court consents to the motion for withdrawal, the court shall immediately notify the Committee for Public Counsel Services to obtain a new assignment of counsel.
- (c) Payment of Counsel Costs.
 - (i) If a party is determined to be indigent, such party may not be ordered, required or solicited to make any payment of the cost of counsel.
 - (ii) If a party is determined to be indigent but able to contribute, the judge may order the party to pay a reasonable amount toward the cost of counsel. This payment shall be made to the probation officer or other appropriate court employee who shall cause the payment to be deposited with the State Treasurer in accordance with law.
 - (iii) If a party has been assigned counsel, at any time prior to the conclusion of the case, the judge, upon a determination that any assets which are the property of the party have become, or are about to become, available funds, may order that a re-examination of indigency take place in accordance with this rule.

Section 9. Waiver Form as to Counsel.

The following form shall be employed by the courts in recording the waiver and certification required in Section 2 of this rule.

Rule 33
COUNSEL FOR DEFENDANTS INDIGENT AND
INDIGENT BUT ABLE TO CONTRIBUTE
(Applicable to District Court and Superior Court)

The assignment of counsel for defendants determined to be indigent or indigent but able to contribute shall be governed by the provisions of G.L. c.211D and Supreme Judicial Court Rule 3:10.

Committee for Public Counsel Services Assigned Counsel Manual Policies and Procedures

XI. Directory of Offices

Assigned Counsel Manual

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A. COUNTY BAR ADVOCATE PROGRAMS

<u>A. COUNTY BAR ADVOCATE PROGRAMS</u>	
BARNSTABLE COUNTY BAR ADVOCATES 3217 Main Street, P.O. Box 586 Barnstable MA 02630-0586 Phone: (508) 362-8886 Fax: (508) 362-8886 e-mail: barnstable@aasp.net Kim Sarowsky, Administrator Dorothy J. Desmond, Clerk Robert T. Cannon, President James J. Higgins, Staff Attorney	HAMPSHIRE COUNTY BAR ADVOCATES Court House, 15 Gothic Street Northampton MA 01060-3084 Phone: (413) 586-5038 Fax: (413) 586-7388 e-mail: hampshire@aasp.net Rebecca J. Ryan, Administrator Gretchen Fiordalice, Administrative Asst. Edward J. Ryan, Jr., President William J. Larkin, Staff Attorney
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e-mail: bristol@aasp.net Gerlinde Lowe, Administrator Shane A. Carlson, President Edmund C. Mathers, Staff Attorney Stewart Hall Grimes, Staff Attorney	Adrienne Clarke, Executive Director Geraldine Meyer, Secretary Cheryl Parson, Secretary Damon J. Borrelli, President John DeVito, Staff Attorney
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B. CPCS PUBLIC COUNSEL OFFICES

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C. OTHER RESOURCES

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<u>Franklin, Berkshire</u> Dorothy Storrow, Esq. P.O. Box 202 Greenfield, MA 01302 (413) 772-2425 fax: (413) 773-5755	<u>Norfolk-Suffolk Probate</u> Ruth Keeley, Esq. 339 Hancock Street, 2 nd floor Quincy, Ma 02171 (617) 773-1133 fax (617) 472-7953
<u>Hampden</u> Paul R. Viets, Esq. 101 State Street , Suite 612 Springfield, MA 01103 (413) 734-0505 fax (413) 737-2811	<u>Plymouth</u> Tracy D. Galloway, Esq. 35 Park Street Stoughton, MA 02072 (781) 344-7972 fax (781) 344-7949
<u>Worcester</u> Deborah A. S. Capuano, Esq. PO Box 1064 Westborough, MA 01581 (508) 366-3992 fax (508) 366-8926	<u>Suffolk Juvenile Court Only</u> Christine Bonardi, Esq. 82 South Street Jamaica Plain, MA 02130 (617) 971-0344 fax (617) 971-0344

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Stan Goldman, Esq.

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Mental Health Legal Advisors Committee

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Center for Public Representation

22 Green Street
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Cambridge & Somerville Legal Services

432 Columbia Street
Cambridge, MA 02141
(617) 494-1800
(Deborah Filler)

Disability Law Center

11 Beacon Street, Suite 925
Boston, MA 02108
(617) 723-8455
(for mental retardation issues)

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*1998 - 1999 Mental Health Litigation
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Boston, MA 02108
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